89-1896

Supreme Court, U.S.
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NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

AVONDALE SHIPYARDS, INC.
Petitioner

VERSUS

CHESTER J. ORGERON, JR. and
his wife, CONNIE E. LYNN CAMUS ORGERON
Respondent

On Petition For Writ of Certiorari
to the Supreme Court of the
State of Louisiana

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER, IN A GENERAL MARITIME LAW VESSEL NEGLIGENCE ACTION BROUGHT IN STATE COURT, THE LOUISIANA SUPREME COURT MAY ADOPT AND APPLY A TEST FOR VESSEL STATUS CONTRARY TO THE TEST FOR VESSEL STATUS ESTABLISHED BY FEDERAL GENERAL MARITIME LAW.

II. WHETHER THE GENERAL MARITIME LAW TEST FOR VESSEL STATUS AS SET FORTH IN *THE ROBERT W. PARSONS*, 191 U.S. 17, 24 S. Ct. 8 (1903) AND ITS PROGENY, OR THE STATUTORY DEFINITION OF VESSEL AS SET FORTH IN 1 U.S.C. §3, GOVERNS THE ISSUE OF VESSEL STATUS IN THE GENERAL MARITIME LAW CAUSE OF ACTION FOR VESSEL NEGLIGENCE PRESERVED BY SECTION 5(B) OF THE LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT, 33 U.S.C. §905(B).

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DECISIONS BELOW

1. August 31, 1988, decision by trial court in favor of ASI (Appendix C).

2. April 12, 1989, decision by Louisiana Court of Appeal, 5th Circuit, affirming trial court (Appendix D, see also 542 So. 2d 640).

3. February 5, 1990, decision by Louisiana Supreme Court, reversing and remanding (Appendix A, see also 556 So. 2d 582).

4. March 8, 1990, denial of petition for rehearing by Louisiana Supreme Court (Appendix B).

JURISDICTION

The judgment sought to be reviewed is the February 5, 1990, judgment of the Louisiana Supreme Court in *Chester J. Orgeron, Jr. and his wife, Connie E. Lynn Camus Orgeron v. Avondale Shipyards, Inc.*, 89-C-1455 (Appendix A). Rehearing in the Louisiana Supreme Court was timely sought by petitioner and was denied without comment by the Louisiana Supreme Court on March 8, 1990 (Appendix B).

Suit was originally brought by respondent in Louisiana State District Court under the savings to suitors clause, 28 U.S.C. §1333(1). In this general maritime law case, respondent Orgeron brought suit for damages allegedly caused by the negligence of an alleged vessel; respondent invoked the general maritime law cause of action preserved by section 5(b) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §905(b). Jurisdiction in this Court is founded upon this Court's final review of admiralty and maritime causes, United States Constitution Art. III, §2, cl. 2, and 28 U.S.C. §§1257 and 2104.

STATUTES INVOLVED

This petition raises issues concerning the following constitutional articles and statutes of the United States:

1. U. S. Const. Art. III §2, in pertinent part:

The judicial Power shall extend to all

> Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . . to all Cases of admiralty and maritime Jurisdiction. . . .

2. Longshore and Harbor Workers' Compensation Act, Section 5(b), 33 U.S.C. §905(b), reproduced in footnote 1.

3. 1 U.S.C. §3:
> The word "vessel" includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.

STATEMENT OF THE CASE

Avondale Shipyards, Inc., (ASI) operates shipbuilding and vessel repair facilities in the State of Louisiana. ASI's Harvey Quick Repair Yard lies along the bank of the Harvey Canal, a man-made, navigable canal adjoining the west bank of the Mississippi River across from New Orleans.

The sole purpose of ASI's Harvey facility is the repair of vessels that belong to others. R. at 259-60, 328. To accomplish these repairs, the yard has five drydocks which lie in the Harvey Canal adjacent to the yard's bulkhead. These drydocks are typical of the genre: they are large, floating structures, with flat, wide, hollow bottoms and hollow, vertical side walls known as "wing walls." The drydocks are free-floating and

can be moved about, but normally are lined up just offshore of the yard's bulkhead, with the wing walls perpendicular to shore. R. at 327, 329-37; Exhibits P-11, D-34.

To facilitate its vessel repair work, the ASI Harvey yard, like most other vessel repair yards, has built several small, matchbox-shaped, floating structures known as "work flats" or "pontoons." These structures are identical in form and function to the structures described in *Mayfield v. Wall Shipyard, Inc.*, 510 F. Supp. 605 (E.D.La. 1981) (Appendix G) and *Fleming v. Port Allen Marine Service, Inc.*, 552 F. Supp. 27 (M.D. La. 1982) (Appendix F). These steel pontoons, of which eight were in use, vary in size from a length of eighteen feet to sixty feet. All of the pontoons but one have a depth (deck to bottom measurement) of two feet. The one exception, a thirty-six foot by twelve foot pontoon, has a depth of only one foot, three inches. Exhibit D-34.

The pontoons are rectangular in shape and square at each end. Every angle in construction is a ninety-degree angle. Obviously, the pontoons have no distinguishable bow or stern, nor identifiable port or starboard sides. Exhibits D-1 to D-12. The pontoons have no bilge pumps, no motive power, no hatches, no below deck storage, no navigation lights, no crew quarters or on-deck cabin structures of any nature, no raked bow, and no Coast Guard or State vessel identification numbers. The pontoons are not registered with either the Coast Guard or the State as vessels, nor are they subject to Coast Guard vessel inspection. They are simply square, flat, steel platforms that float. R. at 293-94, 296, 333, 339-40; Exhibits D-1 to D-12, D-34.

Just as in *Mayfield* and *Fleming*, the pontoons are used as floating work platforms in the repair of vessels at the yard.

R. at 261, 277-79, 311-13, 328, 394, 395. The pontoons are normally positioned between the drydocks and the bulkhead. In this position, the pontoons are used to work on the underside of the sterns of drydocked vessels. The drydocked vessels are "overhung" or projected past the end of the drydock to facilitate the removal of propeller shafts and rudders which would otherwise be blocked from removal by the presence of the drydock's deck. R. at 241-45. Because the pontoons float, the pontoons can be moved aside to allow the removal by shore crane of a rudder or propeller assembly from a drydocked vessel. R. at 321. The pontoons provide the shipyard workers with access to the "overhung" rudders and shafts and serve as a work platform or an extension of the drydock.

Respondent Orgeron worked as a welder and machinist at ASI's Harvey facility, performing tasks in the landside shops and also directly on the hulls of drydocked vessels. R. at 258, 291, 345. Orgeron was a ship repairman within the meaning of 33 U.S.C. §902(3) and therefore was covered by the Longshore and Harbor Workers' Compensation Act (LHWCA). Orgeron claims that on September 9, 1983, he fell between two pontoons while effecting repairs on the stern of an "overhung" drydocked vessel.

In addition to collecting LHWCA compensation benefits, Orgeron sued ASI under the Jones Act and also under the general maritime law "vessel negligence" action preserved by section 5(b) of the LHWCA, 33 U.S.C. §905(b).[1] As a premise to both claims, Orgeron had to show that the pon-

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[1]At the time of Orgeron's alleged injury, Section 5(b) provided:

In the event of injury to a person covered under

> this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide shipbuilding or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing shipbuilding or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

Section 5(b) was amended in 1984 to eliminate a ship repairer's action against his employer as vessel owner. Section 5(b) now reads:

> In the event of injury to a person covered under this chapter caused by the negligence of a

toons were "vessels" under general maritime law. Orgeron abandoned his Jones Act claim prior to trial and pursued only his "vessel negligence" claim against ASI as the owner of the pontoons.

The Trial Judge applied the general maritime law test for vessel status set forth in *The Robert W. Parsons*, 191 U.S. 17, 24 S. Ct. 8 (1903), and therefore considered the design and use of the pontoons in deciding whether or not they were vessels under general maritime law. (Appendix C at 2). The Trial Judge found that the work pontoons were not vessels under general maritime law. This finding was based on the design of the work pontoons, why they were made to float, and the purpose for which they were used. R. at 205 (Appendix C at 2). Thus, the Trial Judge entered judgment in favor of ASI. This ruling was in harmony with two previously decided federal cases directly on point, *Mayfield* and *Fleming*, both of which also applied the general maritime law design and use test in holding that work pontoons used as ancillaries to drydocks in vessel repair operations were not "vessels" for purposes of the "vessel negligence" action preserved by

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vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in provid-

section 5(b) of the LHWCA.

The Louisiana Court of Appeal for the Fifth Circuit affirmed. *Orgeron v. Avondale Shipyards, Inc.*, 542 So. 2d 640 (La. App. 5th Cir. 1989) (Appendix D). The Court of Appeal noted that the general maritime law jurisdictional test for "vessel status" must be met in order for a plaintiff to sue under the general maritime law cause of action

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> ing stevedoring services to the vessel. If such person was employed to provide shipbuilding, repairing, or breaking services and such person's employer was the owner, owner pro hac vice, agent, operator, or charterer of the vessel, no such action shall be permitted, in whole or in part or directly or indirectly, against the injured person's employer (in any capacity, including as the vessel's owner, owner pro hac vice, agent, operator, or charterer) or against the employees of the employer. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

As the language of the statute shows, by the 1984 amendment, only the "vessel negligence" action by a ship repairer or builder against his or her employer as vessel owner is eliminated. All formerly applicable "vessel negligence" actions remain in force. *See infra* at 15-16. Thus, the questions raised by this petition are immensely important for maritime industry and interests.

preserved by section 5(b). Applying this test, the Court of Appeal held that the work pontoons did not qualify as vessels.

Subsequent to the Louisiana State Fifth Circuit's decision, but before the Louisiana Supreme Court's decision, the United States Fifth Circuit reaffirmed that the general maritime law "design and use" test for vessel status applies in a section 5(b) case. In *Ducrepont v. Baton Rouge Marine Enterprises, Inc.*, 877 F. 2d 393 (5th Cir. 1989) (Appendix E), the Fifth Circuit held that a floating barge used as a work platform and adjunct to a drydock is not a vessel.

The Louisiana Supreme Court granted writs in this case and reversed, holding that ASI's pontoons are "vessels," and therefore that Orgeron can sue his employer as "vessel owner." The Louisiana Supreme Court viewed its task not as deciding whether the pontoons are "vessels" under the general maritime law, but as whether the pontoons are "vessels" under section 5(b) of the LHWCA (Appendix A at 1). The Louisiana Supreme Court, treating Orgeron's suit as a statutory cause of action, reasoned that the term "vessel" should be liberally interpreted under the LHWCA (Appendix A at 5). Thus, the Louisiana Supreme Court disregarded the general maritime law test for vessel status applied in the federal courts and which had also been followed by the state court of appeal and the trial court in this matter. The Louisiana Supreme Court instead adopted a solely statutory construction test for vessel status, and held that ASI's pontoons are "vessels" for purposes of a suit brought under LHWCA section 5(b) because they are "'capable of being used as a means of transportation on water,'" (Appendix A at 6-7) (quoting 1 U.S.C. §3), even though the pontoons were actually designed and used as work platforms — floating extensions of ASI's drydocks. The Louisiana Supreme Court remanded for a determination of ASI's

liability as "vessel" owner.

ARGUMENT

This court should grant certiorari and resolve the conflict that the Louisiana Supreme Court has created in the important maritime law issue of what constitutes a "vessel." Two of the considerations in favor of granting certiorari are presented by this petition. *See* Supreme Court Rules 17.1(b)&(c).

First, the decision by the Louisiana Supreme Court to adopt a "liberal" statutory construction definition of "vessel" conflicts with federal courts of appeals decisions on this issue, which have instead applied the general maritime law test that, in order to qualify as a vessel, a floating structure must be designed and used primarily for navigation. Supreme Court Rule 17.1(b). There is no doubt that even in the federal circuit encompassing Louisiana, i.e., the Fifth Circuit, ASI's pontoons would *not* be considered vessels as a matter of law if this suit would have been brought in federal court. *E.g., Ducrepont v. Baton Rouge Marine Enterprises, Inc.*, 877 F. 2d 393 (5th Cir. 1989)(Appendix E). In addition to the Fifth Circuit's *Ducrepont* decision, two section 5(b) cases directly and squarely on point, involving identical claims as to the "vessel" status of work pontoons used in shipyard operations, have been decided in Louisiana federal district courts. Both cases, following settled federal precedent, held that such work pontoons are not vessels as a matter of general maritime law. *Fleming v. Port Allen Marine Service, Inc.*, 552 F. Supp. 27 (M.D. La. 1982) (Appendix F); *Mayfield v. Wall Shipyard, Inc.*, 510 F. Supp. 605 (E.D. La. 1981)(Appendix G); *Fleming* and *Mayfield* were cited with approval by the United States

Fifth Circuit in *Bernard v. Binnings Construction Co., Inc.*, 741 F. 2d 824, 830 n. 22 (5th Cir. 1984).

Thus, by conflicting with federal decisions on the issue, the Louisiana Supreme Court's decision in this case raises two recurrent concerns of this Court. These are the prevention of forum shopping and the preservation of uniform maritime law.

The opportunity for forum shopping is undeniably created by the Louisiana Supreme Court's decision. If a plaintiff brings a general maritime law tort suit in federal court, including federal court in Louisiana, the general maritime law "vessel status" test will apply, and floating structures whose transportation function, if any, is only incidental to their primary use as work platforms will not be vessels as a matter of law and therefore the suit will be dismissed. *E. g., Ducrepont*, 877 F.2d at 396; *Davis v. Cargill, Inc.*, 808 F.2d 361, 362 (5th Cir. 1986); *Bernard v. Binnings Construction Co., Inc.*, 741 F.2d 824, 829, 831 (5th Cir. 1984); *Fleming*, 552 F. Supp. at 30; *Mayfield*, 510 F. Supp. at 607. Conversely, if the same plaintiff files suit in state court, then under the Louisiana Supreme Court's reasoning in *Orgeron, any* floating structure that is even theoretically capable of the movement of men or cargo in navigation will be a "vessel," even though the structure was designed and used as a work platform.

A related concern is the uniformity of maritime law. Decisions that promote forum shopping have been condemned *per se* by this Court. *See Erie R.R. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817 (1938). However, when the offending decision contravenes the uniformity of maritime law, the need for this Court to resolve the conflict presents a uniquely federal

concern. The primary reason for the investment by the framers of the constitution of jurisdiction over admiralty and maritime cases in the federal courts was to preserve and to develop uniform law to govern shipping and other maritime concerns. *E.g., Romero v. International Term. Operating Co.*, 358 U.S. 354, 373 & n.33, 79 S. Ct. 468, 480 & n.33, (1959); *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 628, 79 S. Ct. 406, 408-09 (1959); *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 160-61, 40 S. Ct. 438, 440 (1920). This Court sits as the final arbiter, the final resolver of conflicts, the harmonizer in maritime cases. Louisiana is a very important state for maritime industry, with maritime terminals and shipping spread throughout the coastal zone and up the Mississippi River, with a well-developed offshore oil industry, and as home of the Port of New Orleans, the nation's second largest port. This Court must not allow the Louisiana State and Federal Court systems, with concurrent jurisdiction over cases such as the present, to apply differing, indeed, diametrically opposed and outcome-determinative tests to the most important issue in maritime law: whether a floating structure is a "vessel."

The second consideration in favor of this Court granting certiorari is that the Louisiana Supreme Court has decided an important issue of federal law, i.e., what constitutes a vessel, in a manner that conflicts with a decision of this Court. Supreme Court Rule 17.1(c). In *The Robert W. Parsons*, 191 U.S. 17, 24 S. Ct. 8, (1903), this Court held that the test for vessel status under the general maritime law is whether the design and use of a water-borne structure is for navigation and commerce. *Id.* at 30, 24 S. Ct. at 12. This Court's *Parsons* test is not simply some ancient pronouncement that has now fallen by the wayside; rather the *Parsons* test is followed and consistently cited and quoted in vessel status cases. *See, e.g.,*

Hurst v. Pilings & Structures, Inc., 896 F. 2d 504, 506 (11th Cir. 1990); *Richendollar v. Diamond M Drilling Co.*, 819 F. 2d 124, 127 (5th Cir.) *(en banc), cert. denied*, 484 U. S. 944, 108 S. Ct. 331 (1987); *Bernard*, 741 F.2d at 829; *Cook v. Belden Concrete Products, Inc.*, 472 F.2d 999, 1001 (5th Cir.), *cert. denied*, 414 U. S. 868, 94 S. Ct. 175 (1973). The failure of the Louisiana Supreme Court to follow the *Parsons* decision of this Court cannot be ignored. The Louisiana Supreme Court's decision is binding on the inferior courts of the state and will lead to future decisions that will be contrary to this Court's *Parsons* decision and federal general maritime law.

It is submitted that the Louisiana Supreme Court erred in adopting a statutory test for vessel status in this matter and by disregarding the federal case-law to the contrary. To begin with, it is clear that the Louisiana Supreme Court incorrectly construed Orgeron's cause of action to be statutorily created by section 5(b) of the LHWCA. Yet, it is well-settled and uniformly recognized in the federal cases that a section 5(b) suit is *not* a creature of statute. Rather, section 5(b) simply *preserves*, with certain limitations, a tort action in general maritime law that existed before the LHWCA. *May v. Transworld Drilling Co.*, 786 F. 2d 1261, 1264 (5th Cir.), *cert. denied*, 479 U.S. 854, 107 S. Ct. 190 (1986); *Russell v. Atlantic & Gulf Stevedores*, 625 F. 2d 71, 72 (5th Cir. 1980); *Parker v. South Louisiana Contractors, Inc.*, 537 F. 2d 113, 117 (5th Cir. 1976), *cert. denied*, 430 U.S. 906, 97 S. Ct. 1175 (1977). As Congress made clear in its report accompanying the 1972 legislation that amended the LHWCA to add section 5(b), the effect of that section is to eliminate a covered worker's general maritime law unseaworthiness claim, while preserving the judge-made, general maritime law action for the negligence of a vessel. H.R. Rep. No. 1441, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Admin. News

4698.

As a judge-made, general maritime law cause of action, the "vessel negligence" remedy preserved by section 5(b) of the LHWCA has depended upon the judge-made, general maritime law definition of a vessel, i.e., the test set forth in this Court's *Parsons* case. *E.g., Ducrepont*, 877 F.2d at 396. The Louisiana Supreme Court instead treated the issue purely as one of interpreting the statutory meaning of the word "vessel" in section 5(b), and utilized the very broad test set forth in 1 U.S.C. §3, without reference to interpretative federal case law. As clearly held by the Federal Fifth Circuit in *Richendollar*, use of a statutory definition of vessel in a section 5(b) case is inappropriate. 819 F.2d at 126. In *Ducrepont*, the Fifth Circuit reaffirmed that a statutory definition of "vessel" is inappropriate, specifically rejecting the contention that the "capability" standard set forth in 1 U.S.C. §3 can apply in a section 5 (b) action. 877 F.2d at 395-96.

Further, the definitions provided in Title 1 of the United States Code are for interpreting the meanings of words in laws passed by Congress. *See* 1 U.S.C. §1. Thus, a proper example for the use of 1 U.S.C. §3 would be in interpreting the meaning of the word "vessel" in the Shipowners' Limitation of Liability Act, 46 U.S.C. §§181-188. *See Keys Jet Ski, Inc. v. Kays*, 893 F.2d 1225, 1230 (11th Cir. 1990). However, as to a *non-statutory* general maritime law action such as that preserved by section 5(b) of the LHWCA, a statutory definition has no applicability. *Ducrepont*, 877 F. 2d at 395-96; *Richendollar*, 819 F.2d at 126.

Further, even applying 1 U.S.C. §3 in a statutory limitation action, this Court has jurisprudentially engrafted upon 1 U.S.C. §3 the requirement that the structure at issue not

simply be *capable* of use in navigation, but must also be so used in order to qualify as a vessel. *Evansville & Bowling Green Packet Co. v. Chero Cola Bottling Co.*, 271 U.S. 19, 21-22, 46 S. Ct. 379, 380 (1926). In *Keys Jet Ski*, the Eleventh Circuit also noted that 1 U.S.C. §3, taken literally, would lead to such "absurd" consequences as a "styrofoam surf board, a life preserver, or even a conventional water ski" being deemed vessels. 893 F.2d at 1230. Thus, the Louisiana Supreme Court not only erred by adopting a statutory test for vessel status in a non-statutory action, it compounded that error by disregarding this Court's precedent as to the proper and practical interpretation of that statute.

The Louisiana Supreme Court also erroneously concluded that the 1984 amendment to section 5(b) of the LHWCA eliminates *all* actions by covered workers against their employers as vessel owners (Appendix A at 1-2 n.1). Actually, the 1984 amendment only eliminates actions by ship repairers and ship builders against their employers as vessel owners. *Davis v. Cargill, Inc.*, 808 F. 2d 361 n.1 (5th Cir. 1986); *see also ante* at footnote 1.

As to all other classes of maritime workers, the "dual capacity" doctrine, *see, e.g., Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 103 S. Ct. 2541 (1983), that allows LHWCA employers to be sued by their employees as vessel owners, remains in force. Further, as recognized by this Court in *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 103 S. Ct. 634 (1983), *any* worker who is injured in the course of employment duties while on a vessel on navigable waters will be deemed covered by the LHWCA, even if not engaged in traditional longshore tasks.Thus, given the Louisiana Supreme Court's broad and novel interpretation of what is a vessel, any worker who happens to be injured on

anything that is floating, i.e., "capable" of use in navigation, will have a "vessel negligence" cause of action against the owner of that floating structure in the state courts of Louisiana. Moreover, any worker *other than* a ship builder or repairer can maintain such an action even if the floating structure's owner is also the worker's employer who would otherwise be subject only to a workers' compensation claim. Contrary to the Louisiana Supreme Court's implicit assertion, its decision does not have limited application. Rather, the Louisiana Supreme Court's definition of vessel produces the ironic result that workers other than shipyard workers can assert *federal* maritime law tort actions against their employers in Louisiana *state* court that would be dismissed as a matter of law in *federal* court.

The Louisiana Supreme Court also erroneously reasoned that a different test for vessel status applies in suits by LHWCA-covered workers from the test for vessel status employed in suits by seamen, i.e., claims under the Jones Act, 46 U.S.C. §688, and under the general maritime law warranty of seaworthiness. There is simply no support for this in the federal case-law, and *Ducrepont* is to the contrary. The word "vessel" does not even appear in the Jones Act, and the courts have routinely applied the same general maritime law "design and use" test to determine the existence of a vessel for seamen's claims and LHWCA-covered workers' claims. *See, e.g., Richendollar*, 819 F.2d at 127 (section 5(b) case); *Davis v. Cargill, Inc.*, 808 F. 2d 361, 362 (5th Cir. 1986) (section 5(b) case); *Bernard*, 741 F.2d at 829 (seaman's case); *Cook v. Belden Concrete Products, Inc.*, 472 F.2d 999, 1001 (5th Cir.), *cert. denied*, 414 U.S. 868, 94 S.Ct. 175 (1973) (seaman's case); *Atkins v. Greenville Shipbuilding Corp.*, 411 F.2d 279, 282-83 (5th Cir.), *cert. denied*, 396 U.S. 846, 90 S. Ct. 105 (1969) (unseaworthiness claim by longshoreman prior to

1972 amendment to LHWCA eliminating this action); *Fleming*, 552 F. Supp. at 29-30 (section 5(b) case); *Mayfield*, 510 F.Supp. at 607 (section 5(b) case).

In *Lash v. Ballard Construction Co.*, 707 F. Supp. 461 (W.D. Wash. 1989), the plaintiff argued, as in the present matter, that different tests apply to the "vessel status" determination as between LHWCA cases and seamen's cases. The *Lash* Court correctly reasoned that although a seaman must also show a more or less permanent attachment to a vessel, i.e., qualify as a crewmember, the underlying issue of whether a structure is or is not a vessel in the first place is *exactly* the same in both section 5(b) and seaman's cases: whether the structure is designed for and used in navigation, or is instead a floating work station whose transportation function, if any, is only incidental to its primary work platform function. *Id.* at 463, 465. The federal courts have uniformly applied the same test of vessel status in seamen's and section 5(b) cases, and there is no logical or doctrinal reason to apply different tests.

ASI does not wish to be unduly critical of the Louisiana Supreme Court, but the numerous errors in that court's opinion amply illustrate the haphazard and result-oriented approach taken by the Louisiana Supreme Court to what is, indeed, a serious issue of federal general maritime law. The Louisiana Supreme Court criticized the Louisiana Fifth Circuit's decision in this case as purportedly improperly relying on language in the United States Fifth Circuit's decision in *Ducrepont v. Baton Rouge Marine Enterprises, Inc.*, 877 F. 2d 393 (5th Cir. 1989). (Appendix A at 11). This could not have occurred because the Louisiana Fifth Circuit's decision in this case was handed down on *April 12, 1989*, and *Ducrepont* was not decided until over three months later, on *July 18, 1989*.

ASI pointed out this glaring error along with the Louisiana Supreme Court's numerous other errors in ASI's petition for rehearing, but that petition was summarily denied. Yet, when the West Reporter version of the Louisiana Supreme Court's decision was printed, *see* 556 So. 2d 582, the Louisiana Supreme Court tried to cover up this mistake by saying that the Louisiana Fifth Circuit improperly relied on language in *Bernard v. Binnings Construction Co., Inc.*, 741 F. 2d 824 (5th Cir. 1984). 556 So. 2d at 587. However, in the West Reporter, the Louisiana Supreme Court attributes to *Bernard* the same language that in fact is a direct quote from *Ducrepont*, with only the quotation marks removed. *Compare* Appendix A at 11 *with* 556 So. 2d at 587 *and* 877 F.2d at 395. It should also be noted that nothing even similar to the language attributed by the Louisiana Supreme Court in the West Reporter to *Bernard* actually appears in the *Bernard* opinion. Most telling of all, in the doctored version of the Louisiana Supreme Court's opinion appearing in the West Reporter, although the citation in the text is changed to *Bernard*, footnote 17 remains. Footnote 17 identifies the page location of the previously quoted language of *Ducrepont*, the true source of language that most assuredly was not relied upon by the Louisiana Fifth Circuit, as it had not even been written when the Louisiana Fifth Circuit issued its opinion.

One must question the seriousness with which the Louisiana Supreme Court treated this significant issue of federal general maritime law. One must also question whether the Louisiana Supreme Court was truly concerned with following federal maritime law, given that Court's sloppy attempt to cover up an even sloppier error that goes to the heart of the Court's decision.

Further, the Louisiana Supreme Court, in incorrectly

treating the vessel status issue as a matter of statutory interpretation under the LHWCA, cited this Court's opinion in *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 103 S. Ct. 634 (1983), as authority to apply a "liberal interpretation." (Appendix A at 5). Yet, it is manifest from this Court's *Perini* opinion that the "liberal interpretation" rule is for questions of *workers' compensation* payable under the LHWCA, and has nothing to do with the tort remedies preserved by section 5(b).

CONCLUSION

A simple comparison of the Louisiana Supreme Court's decision in this matter with the federal *Ducrepont, Mayfield,* and *Fleming* decisions (copies of all are in the appendix), demonstrates that the Louisiana Supreme Court has adopted a completely contrary position to the federal courts on the issue of what constitutes a vessel under general maritime law. ASI submits that the Louisiana Supreme Court has erred, and that its decision herein must be reversed. Most fundamentally, such a conflict between the federal courts and the Louisiana Supreme Court must not be allowed to exist on this important issue in an area of federal maritime law over which the state and federal courts exercise concurrent jurisdiction. It is imperative that this Court grant certiorari and set forth a uniform test to be applied to the issue of vessel status in general

maritime law cases, whether pending in federal or state court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the above and foregoing have been forwarded to all counsel of record by depositing same in the U. S. mail, postage prepaid and properly addressed this 4th day of June, 1990.

EDWARD J. KOEHL, JR.

Appendix A

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SUPREME COURT OF LOUISIANA

NO. 89-C-1455

CHESTER J. ORGERON, JR. and his wife,
CONNIE E. LYNN CAMUS ORGERON

versus

AVONDALE SHIPYARDS, INC.

==========

On Writ of Review from the
Court of Appeal, Fifth Circuit,
State of Louisiana,
Parish of Jefferson

WATSON, Justice.

In this claim for damages under the Longshore and Harbor Workers' Compensation Act (LHWCA), the threshold issue is whether the work barges on which plaintiff was injured qualify as vessels under the Act. [1]

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[1] 33 U.S.C. §905(b) stated:

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against

FACTS

On September 9, 1983, plaintiff, Chester J. Orgeron, Jr., was employed in ship repair at Avondale's Quick Repair Yard which is located on a slip fronting the Harvey Canal. The slip is dredged to a depth of twenty-five to twenty-seven feet. Both the slip and the canal are part of the Intracoastal Waterway, a navigable artery of commerce. Working at night, Orgeron fell into an opening between two barges or pontoons. He alleged negligence of Avondale or its vessels.

> such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

[4] The accident occurred on September 9, 1983 before the 1984 amendment to subsection (b) which eliminated a vessel negligence action against an employer under this section.

The pontoons were floating work platforms which also moved men and materials over the water comprising the slip of the Harvey Quick Repair Yard. Lance S. Bourgeois, Jr., the yard superintendent, an employee of Avondale for over forty years, testified that the pontoons/barges were all built in the Harvey Quick Repair Yard and designed to Avondale's specifications. Bourgeois acknowledged that the pontoons transported workers' tools and equipment from place to place.[2]

Although their transportation function was incidental to their primary use, the barges had some design features not common to fixed, stationary platforms. They were free floating rather than permanently attached in one location; they

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[2] Q: But Mr. Bourgeois it's capable of carrying anchors and propellers around that yard and as a matter of fact, it does carry anchors?
A: Yes, it carries the repair work that we do.
Q: It carries heavy equipment around that yard; doesn't it?
A: No more than what it can handle on the wheel and rudders.
Q: Okay, but they are pretty heavy; aren't they?
A: Some of them may be eight, nine hundred pounds, maybe a ton.
Q: When these things move around the yard, Mr. Bourgeois, don't they have the workers' tools on them, sir?
A: They do have.
Q: These things are never permanently anchored in place; are they, sir?
A: Not permanently, no.
Tr. 296-97.

were pulled or pushed where needed. Recessed valve bitts[3] on the corners of the barge-shaped pontoons were used when they were towed or moved or fastened together. The barges carried men wearing life vests as well as equipment.[4] They were subject to the perils of the sea, sometimes breaking loose from their moorings.

Just prior to his accident, Orgeron, a ship repairman, was working from one of Avondale's largest barges, which measured approximately sixty by twenty feet and had a two-foot draft. When Orgeron arrived at his job, the barge was abutting a smaller one. About four hours later, Orgeron took a heating torch from a co-worker and turned to hand it to another one. As he moved, he stepped into a gap which had opened between the barges, injuring his back.

The trial court concluded that plaintiff failed to carry his burden of proving that the structures on which he was working qualified as vessels under the Act. Because plaintiff did not prove vessel status, the court did not consider negligence, causation or damages. The court of appeal affirmed[5] on the ground that the structures were work platforms, which

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[3] "A single or double post of metal or wood fixed on the deck of a ship and around which mooring lines or other lines are made fast." Webster's Third New International Dictionary 223 (1976).

[4] Q: Were life vests ever used by anyone on these barges?

A: You were always required to use life vest when you was on that pontoon and it was moving.

Tr. 352.

[5] 542 So.2d 640 (La.App. 5 Cir. 1989).

incidentally performed some transportation functions. A writ was granted to consider the judgment of the court of appeal.[6]

LAW AND CONCLUSION

The Longshore and Harbor Workers' Compensation Act provides compensation benefits to maritime employees for disability or death occurring on the navigable waters of the United States during the loading, unloading, repairing or building of a vessel.[7] Until passage of the LHWCA in 1927, this category of worker was frequently without remedy. As a humanitarian and remedial measure, the LHWCA must be liberally construed. *Director, OWCP v. Perini North River Association*, 459 U.S. 297, 103 S.Ct. 634, 74 L.Ed. 2d 465 (1983).

The LHWCA and the Jones Act[8] furnish mutually exclusive remedies. *Swanson v. Marra Bros.*, 328 U.S. 1, 66 S.Ct. 869, 90 L.Ed. 1045 (1945). The Jones Act only applies to seamen who are members of a vessel's crew and aid in its navigation. *Senko v. LaCrosse Dredging Corp.*, 352 U.S. 370, 77 S.Ct. 415, 1 L.Ed. 2d 404 (1957). A Jones Act seaman must have a more or less permanent attachment to a vessel or fleet of vessels,[9] while recovery under Section 905(b) of the LHWCA can be based upon transitory contact with a vessel.

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6 550 So. 2d. 619 (La. 1989).

7 33 U.S.C. §903(a).

8 46 U.S.C. §688.

9 *Barrett v. Chevron, U.S.A., Inc.*, 781 F.2d 1067 (5th Cir. 1986).

Injured workers have a lesser recovery under the compensation remedy of the LHWCA than seamen have under the negligence action furnished by the Jones Act. Seamen have the right to maintenance and cure, the liberal remedy afforded by the Jones Act and a strict liability cause of action for unseaworthiness. The warranty of seaworthiness only applies to vessels "in navigation," and the injured worker must be engaged in traditional ship's work. Under the 1972 amendments to the LHWCA, longshore and harbor workers no longer have a remedy for unseaworthiness. However, in addition to a compensation claim against his employer, a longshore or harbor worker may bring an action under 33 U.S.C. §905(b) against a vessel owner as a third party to recover damages for an injury caused by negligence of the vessel.[10]

Ship repair is defined as maritime employment in the LHWCA. See *Director, OWCP v. Perini North River Assoc.*, 459 U.S. 297, 103 S.Ct. 634, 74 L.Ed. 2d 465 (1983). In construing the Act's terms, "other statutes having other purposes" are of little aid. *South Chicago Coal & Dock Co. v. Basset*, 309 U.S. 251, 260, 60 S.Ct. 544, 549, 84 L.Ed. 732, 737. Thus, the Jones Act [11] definition of the word vessel should not be substituted for the word vessel in Section 905(b) of the LHWCA.

Under general maritime law, a vessel is "every description of watercraft or other artificial contrivance used or

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[10] In a negligence suit against a vessel under 33 U.S.C. §905(b), liability of the vessel is not "based upon the warranty of seaworthiness."

[11] 46 U.S.C. §688.

capable of being used as a means of transportation on water."[12] This is the capability test for vessel status.

"Since Congress, in its use of the term 'vessel' in §§902(21) and 905(b), did not provide a definition different from the generally acknowledged one found in section 3, we may presume, as other courts have, that it intended to adopt this commonly-used term.... [C]ases decided under the Jones Act, 46 U.S.C. §§541-713 (1976), have looked to a different test in determining what is a vessel for Jones Act purposes... .A craft need not be actually engaged in navigation or commerce in order to come within the definition of 'vessel.' The question is one of residual capacity." *McCarthy v. The Bark Peking*, 716 F.2d 130, 134, 134 n.2, 135 (2d Cir. 1983), *cert. denied*, 465 U.S. 1078, 104 S.Ct. 1439, 79 L.Ed.2d 760 (1984).

After *McCarthy*, Judge Tate considered vessel status under Section 905(b) in *Hall v. Hvide Hull No. 3*, 746 F.2d 294 (5th Cir. 1984), *cert. denied*, 474 U.S. 820, 106 S.Ct. 69, 88 L.Ed.2d 56 (1985). *Hall* held that an incomplete ship floating on navigable waters during its construction is a vessel for purposes of a tort action under Section 905(b). *Hall* followed *Lundy v. Litton Systems, Inc.*, 624 F.2d 590 (5th Cir. 1980), *cert. denied*, 450 U.S. 913, 101 S.Ct. 1353, 67 L.Ed.2d 337 (1981) and *Burks v. American River Transportation Co.*, 679 F.2d 69 (5th Cir. 1982).[13] Footnote 10 of *Hall* points out that

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[12] 1 U.S.C. §3.

[13] *Hall* distinguished *Lowe v. Ingalls Shipbuilding, A Div. of Litton*, 723 F.2d 1173 (5th Cir. 1984) and *Hollister v. Luke Construction Co.*, 517 F.2d 920 (5th Cir. 1975), which did not involve Section 905(b) actions.

the question of whether a vessel is also "in navigation" under the Jones Act is a different issue from the question of vessel status under Section 905(b). Following footnote 29 of *Perini*,[14] *Hall* decided that the remedies of Act-covered employees

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[14] Footnote 29 of *Perini* states:

> Perini cites our decision in *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 34 L.Ed. 2d 454, 93 S.Ct. 493 (1972), and argues that the LHWCA is premised upon admiralty jurisdiction, which requires a connection between an employee and traditional maritime activity. Perini's reliance on *Executive Jet* is misplaced. In that case, the only issue before the Court was whether federal admiralty jurisdiction extended to tort claims arising out of the crash of an airplane into navigable waters on a flight "within the continental United States, which [is] principally over land." *Id.*, at 266, 93 S.Ct., at 493, 34 L.Ed. 2d, at 454. Jurisdiction in *Executive Jet* was predicated on 28 U.S.C. §1333(1) [28 U.S.C.S. §1333(1)], which provides that the federal district courts have original and exclusive jurisdiction of "[a]ny civil case of admiralty or maritime jurisdiction."
>
> The explicit language of *Executive Jet* makes it clear that our discussion was occasioned by "the problems involved in applying a locality-alone test of admiralty tort jurisdiction to the crashes of aircraft" in a situation where "the fact that an aircraft happens to fall in navigable waters, rather than on open land, is wholly fortuitous." 409 U.S., at 265, 266, 93 S.Ct., at 503, 504, 34 L.Ed. 2d, at 465, 466. Although the term "maritime" occurs both in 28 U.S.C. §1333(1) [28 U.S.C.S.

injured on navigable waters were not affected by *Executive Jet Aviation v. Cleveland*, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed. 2d 454 (1952). Under *Executive Jet*, there is admiralty jurisdiction only when a wrong occurs on navigable waters, situs, and bears a significant relationship to traditional maritime activity, nexus.[15] See *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 105 S.Ct. 1421, 84 L.Ed.2d 406 (1985). Historically, ship construction is not regarded as a traditional maritime activity: a ship under construction has not evolved into vessel status.

Richendollar v. Diamond M Drilling Co., Inc., 819 F.2d 124 (5th Cir.), *cert. denied*, 484 U.S. 944, 108 S.Ct. 331, 98 L.Ed.2d 358 (1987) and *Drake v. Raymark Indus., Inc.*, 772 F.2d 1007 (1st Cir. 1985), *cert. denied*, 476 U.S. 1126, 106 S.Ct. 1994, 90 L.Ed.2d 675 (1986), held that a Section 905(b) cause of action must satisfy the *Executive Jet* requirements for admiralty jurisdiction. *Richendollar*, and *en banc* opinion from the Fifth Circuit authored by Judge Politz, decided that a ship being constructed on land was not a vessel within the admiralty jurisdiction of the federal courts because

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§1331(1)] and in §2(3) of the Act, these are two different statutes "each with different legislative histories and jurisprudential interpretations over the course of decades." *Boudreaux v. American Workover, Inc.*, 680 F.2d 1034, 1050 (CA5 1982) (footnote omitted). In addition, Churchill, as a marine construction worker, was by no means "fortuitously" on the water when he was injured. 459 U.S., at 320, 103 S.Ct., at 648-49, 74 L.Ed. 2d, at 482-83.

[15] As a result of *Richendollar*, *Hall* is no longer a reliable precedent with regard to jurisdiction. *Molett v. Penrod Drilling Co.*, 872 F.2d 1221 (5th Cir. 1989).

it was not in or on navigable waters and was incapable of flotation.

On its facts, *Hall* can be distinguished from *Richendollar*. The *Hall* hull was floating in navigable waters, and the *Richendollar* drilling rig was on land with holes in its hull. The *Hall* hull met the capability test: the *Richendollar* rig did not. *Richendollar* points out that the configuration of a watercraft is of secondary importance because size, form, equipment and means of propulsion do not determine jurisdiction.

After *Richendollar*, the Fifth Circuit decided *Rosetti v. Avondale Shipyards, Inc.*, 821 F.2d 1083 (5th Cir. 1987), *cert. denied*, 484 U.S. 1008, 108 S.Ct. 703, 98 L.Ed. 654 (1988), which held that an unfinished vessel, floating but still under construction, was not a vessel for purposes of admiralty jurisdiction or Section 905(b), because it was incomplete and therefore incapable of navigation or its special purpose use on or in the water. *Rosetti* and *Hall* cannot be reconciled: the companion cases both involved floating hulls which were still under construction.

Richendollar and *Drake* rejected *Hall's* treatment of the *Executive Jet* jurisdictional issue. However, that debatable question is not decisive here.[16] *Richendollar* and *Rosetti* do not control this issue of vessel status, because the barges on which Orgeron was working were not under construction.

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[16] Since ship construction is defined as maritime employment in the LHWCA, it is questionable whether the traditional view that ship construction is not a subject of maritime jurisdiction should apply to any part of the Act. See *Perini* and *Hall*.

They were finished products used in the construction of other vessels. The barges were capable of navigation, were afloat on navigable waters and performed a transportation function. Orgeron himself was engaged in ship repair, which has generally been regarded as a traditional maritime activity.

Ducrepont v. Baton Rouge Marine Enterprises, Inc., 877 F.2d 393 (5th Cir. 1989) considered vessel status separately under the Jones Act and Section 905(b) of the LHWCA, because the term vessel in the LHWCA is not synonymous with the term vessel in the Jones Act. The structure at issue in *Ducrepont* was a cargo barge which had been converted into a stationary work platform and, like the platform in *Davis v. Cargill, Inc.*, 808 F.2d 361 (5th Cir. 1986), was analogized to a dry dock. The *Davis* platform was permanently moored, anchored to the riverbed and equipped with a permanently attached landing extension.

In affirming the trial court, the court of appeal here relied on language in *Ducrepont* which stated that the work platform at issue "was moored at the time of the accident; and any transportation function it performed was merely incidental to its primary purpose of serving as a work platform."[17] The court of appeal failed to note that this language was used in the analysis of a barge as a Jones Act vessel and not as a Section 905(b) vessel. In context, this language does not apply to the question of whether the *Ducrepont* work platform was a Section 905(b) vessel. The issue of whether the barge performed a transportation function as a primary or incidental

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[17] 877 F.2d 395.

matter relates to vessel status under the Jones Act.[18]

Ducrepont held that a barge is not a §905(b) vessel when it is firmly moored, seldom moved, not used for navigation and in use as a dry dock or stationary work platform. However, a barge is a vessel within the meaning of the LHWCA even when it has no motive power. *Norton v. Warner Co.*, 321 U.S. 565, 64 S. Ct. 747, 88 L.Ed. 931, 1944 AMC 337 (1944); *The Robert W. Parsons*, 191 U.S. 17, 30, 24 S.Ct. 8, 48 L.Ed. 73 (1903); *Ellis v. United States*, 206 U.S. 246, 27 S.Ct. 600, 51 L.Ed. 1047 (1907). The fact that these barges were pushed or pulled into various locations rather than self-propelled does not remove them from the category of 905(b) vessels. *Richendollar.*

In the Fifth Circuit, the test for vessel status under Section 905(b) of the LHWCA is the capability test in 1 U.S.C. §3, as modified by *Richendollar, Rosetti* and *Ducrepont. Richendollar* and *Rosetti* hold that a Section 905(b) vessel must satisfy the *Executive Jet* requirements for admiralty jurisdiction, a maritime situs and a significant relationship to traditional maritime activity. *Ducrepont* requires that a struc-

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[18] The court of appeal also relied on *Bernard v. Binnings Construction Company, Inc.*, 741 F.2d 824 (5th Cir. 1984), which involved vessel status under the Jones Act. Bernard held that a work pontoon which was not designed for navigation and not in navigation, was not a Jones Act vessel as a matter of law. Since *Bernard* turned on the Jones Act "in navigation" issue, which is extraneous to the LHWCA, the court of appeal erred in considering *Bernard.*

ture be sufficiently mobile to serve some transportation function for vessel status under Section 905(b).

The barges being used as work platforms by Orgeron and his co-workers were capable of transportation on water and they were floating on navigable water. The situs test is met, because Orgeron's accident occurred both on and in navigable water. The nexus test is met because the barges were being used for ship repair, a traditional maritime activity classified as maritime employment by the LHWCA. The barges have vessel status because they were used for transportation on navigable waters.

In *Ducrepont*, the stationary work platform was firmly moored and seldom moved. These barges were not stationary and were frequently moved. In fact, the injury occurred when the barges drifted apart. Avondale's barges meet the capability standard of 1 U.S.C. §3. Additionally, they were designed and used for transportation as well as work platforms.

The trial court erred in concluding that these pontoons/barges were not vessels. They meet the statutory standard. They were clearly capable of transportation and moved periodically around the stretch of navigable water fronting the Harvey Quick Repair Yard. They performed a transportation function.

Since the trial court did not reach the issues of negligence, causation and damages, the case is remanded to the court of appeal for consideration of those questions on the record.

For the foregoing reasons, the judgment of the court of appeal is reversed and the case is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Appendix B

Supreme Court of Louisiana

FOR IMMEDIATE NEWS RELEASE
NEWS RELEASE # 208

FROM: CLERK OF SUPREME COURT OF LOUISIANA

On the *8th day of March, 1990*, the following action was taken by the Supreme Court of Louisiana in the cases listed below:

REHEARINGS DENIED:

87-B- 2002 C/W 87-B- 2727 89-B- 1459	LOUISIANA STATE BAR v. MICHAEL J. RILEY, SR.
88-C- 3035	JOSHEDA WASHINGTON, ET AL v. LOUISIANA POWER & LIGHT COMPANY, ET AL (Parish of Orleans) DIXON, C.J. - would grant a rehearing. CALOGERO, J. - would grant a rehearing. WATSON, J. - would grant a rehearing.
89-C - 1276 C/W 89-C - 1304 89-C - 1310	CLARK HOLLOWAY v. STATE OF LOUISIANA THROUGH DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT C/W CHARLES R. FACUNDUS v. STATE OF LOUISIANA THROUGH DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT (Parish of East Baton

Rouge)
(Two Applications)
CALOGERO, J. - would grant a rehearing.
DENNIS, J. - would grant a rehearing.

89-C - 1455 CHESTER J. ORGERON AND HIS WIFE CONNIE E. LYNN CAMUS v. AVONDALE SHIPYARDS INC. (Parish of Jefferson)

89-C - 1534 STATE OF LOUISIANA, DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT v. ROGER DIETRICH, et al (Parish of Natchitoches)
LEMMON, J. - would grant a rehearing.

89-CA- 2426 FIRST NATIONAL BANK OF COMMERCE, ON ITS OWN BEHALF, AND AS SUCCESSOR IN INTEREST TO THE BANK OF NEW ORLEANS AND TRUST COMPANY v. THE CITY OF NEW ORLEANS, BOBBY MAJOR, JR., IN HIS CAPACITY AS DIRECTOR OF FINANCE FOR THE CITY OF NEW ORLEANS, AND RICHARD BRUNE, IN HIS CAPACITY AS CITY TREASURER FOR THE CITY OF NEW ORLEANS (Parish of Orleans)

Appendix C

24TH JUDICIAL DISTRICT COURT
FOR THE PARISH OF JEFFERSON
STATE OF LOUISIANA

NO: 299-602 DIVISION "N"

CHESTER J. ORGERON JR.
and HIS WIFE, CONNIE E. LYNN CAMUS
VERSUS
AVONDALE SHIPYARDS, INC.

FILED: _____ _____
DEPUTY CLERK

REASONS FOR JUDGMENT

STATEMENT OF CASE

Plaintiff sues under the Longshore and Harborworkers Compensation Act, 33 U.S.C. 905(b), for injuries sustained in a fall at Avondale Shipyards.

FINDINGS OF FACT

The plaintiff worked for defendant at its Harvey Quick Repair Yard on the north bank of the Harvey Canal in Jefferson Parish, Louisiana. He worked both in the landside shops in the yard and on the hulls of vessels drydocked there. To facilitate the vessel repair work, the defendant built several small floatable structures called "work barges," "work flats," or "pontoons." These structures were made of steel, were rectangular in shape, had a two foot or less draft and varied in size from 60' x 20' to 18' x 10'. They were usually positioned between the drydocks and the bulkhead in order to work on the hulls or stern of drydocked vessels. These structures were never used to haul men or machinery in the Harvey Canal and

never left the confines of the yard except by accidentally breaking free.

On September 9, 1983, Chester Orgeron was standing on a pontoon. Another pontoon was alongside. He was working on the overhanging stern of the vessel "Gale C." The pontoons separated and Chester Orgeron fell between them, and partially into the water, injuring his back. He is currently receiving Workman's Compensation benefits as a result of this accident.

CONCLUSIONS OF LAW

To recover damages under LSHWCA 905(b), plaintiff must first prove, by a preponderance of the evidence, that the structure upon which he was injured was a *vessel*. He has failed to carry this burden. In reaching this conclusion the Court considered the design of the structure, why it was made to float, and the purpose for which the structure was used. In this case, these structures were not used, designed or intended for transportation of passengers, cargo or equipment from place to place across navigable waters. They functioned primarily as work platforms and as an extension, arm or ancillary of the drydock. These structures are not vessels. Due to the failure of plaintiff to prove vessel status, the Court did not consider negligence of defendant or cause of injuries to plaintiff.

For the above reasons the Court finds in favor of defendant, Avondale Shipyards, Inc., and dismisses plaintiff's suit, with prejudice, and at the plaintiffs' costs.

GRETNA, LOUISIANA
This _____ day of August, 1988.

_____
James L. Cannella, Judge
Division "N"

Appendix D

CHESTER J. ORGERON AND HIS WIFE, CONNIE E. LYNN CAMUS
VERSUS
AVONDALE SHIPYARDS, INC.

FIFTH CIRCUIT COURT OF APPEAL
STATE OF LOUISIANA
NO. 88-CA-895

APPEAL FROM THE
24TH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, NO. 299-602, DIVISION "N"
THE HONORABLE JAMES L. CANNELLA, JUDGE

SOL GOTHARD
JUDGE

(Court composed of Judges Fred S. Bowes, H. Charles Gaudin, and Sol Gothard)

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AFFIRMED

This appeal is from denial of a claim under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. Sec. 905 (b).

The plaintiff, Chester J. Orgeron, Jr., was injured on September 9, 1983, when he fell between two "pontoons" or "work barges" in Avondale's Harvey Quick Repair Yard, in the Harvey Canal. He was employed as a ship repairman by Avondale Shipyards, Inc. and was working at night, standing on the larger of two abutting pontoons that were tied up and being used as a work platform under the stern of a ship. Unaware that the pontoons had separated, he stepped through the opening and was injured.

Orgeron filed suit against his employer, Avondale, under the LHWCA, alleging that Avondale as owner of the barges (pontoons) was negligent in failing to equip the barges with proper and safe equipment to secure and keep the barges together. After a bifurcated trial of liability only, the judge took the matter under advisement and entered judgment in favor of Avondale. The crux of his reasons for judgment was the plaintiff's failure to carry his burden of proof that the structure on which he was hurt was a *vessel*, as required for recovery under the statute.

The appellant raises as issues: (1) whether or not the Avondale work barges (pontoons) were vessels for purposes of 33 U.S.C. Sec. 905(b); and (2) whether or not Avondale was negligent in its capacity as a vessel owner.

Jurisdiction Under Section 905(b)

Under Section 905(b) a person otherwise covered under the LHWCA may bring a maritime tort action against

the vessel upon which he was injured for the negligence *of the vessel.*[1] The statute was amended in 1984 to prohibit suits against the employer in any capacity. At the time of Orgeron's injury, however, suit could be brought against the owner of a vessel who was also the employer of the injured worker, as is the case here. *Chiasson v. Rogers Terminal and Shipping Corp.*, 679 F.2d 410 (5th Cir. 1982). A recent en banc decision by the U.S. Fifth Circuit, *Richendollar v. Diamond M Drilling Co. Inc.*, 819 F.2d 124 (5th Cir. 1987), on reconsideration, set out its conclusions as to the determination of maritime jurisdiction and the requisites for a maritime tort action under 33 U.S.C. Sec. 905(b). The court stated, at 125:

> ...We reiterate today when it enacted Sec. 905(b), Congress did not create a new or broader cause of action in admiralty than that which previously existed, but rather, it curtailed available third party tort actions, and in doing so it neither expanded nor constricted maritime jurisdiction. We hold that in order for a waterborne structure to qualify as a "vessel" under Sec. 905(b), it must be a vessel for purposes of maritime jurisdiction. Such a vessel must be capable of navigation or its special purpose use on or in water. We further hold that to be cognizable under Sec. 905(b), a tort must occur on or in navigable waters subject, of course, to the special provisions of the Admiralty Extension Act, and there must be the traditional admiralty nexus. . . .
> [Footnotes omitted.]

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[1]For a history of the statute, see *Drake v. Raymark Industries, Inc.*, 772 F.2d 1007 (1st Cir. 1985).

Earlier on, the court had said in *Offshore Company v. Robison*, 266 F.2d 769, 779 (5th Cir. 1959), a Jones Act case:

> Attempts to fix unvarying meanings have a firm legal significance to such terms as "seaman", "vessel", "member of a crew" must come to grief on the facts. These terms have such a wide range of meaning, under the Jones Act as interpreted in the courts, that, except in rare cases, only a jury or trier of facts can determine their application in the circumstances of a particular case. Even where the facts are largely undisputed, the question at issue is not solely a question of law when, because of conflicting inferences that may lead to different conclusions among reasonable men, a trial judge cannot state an unvarying rule of law that fits the facts. . . .

The appellant argues that the characteristics of the craft from which he fell conforms to the definition of vessel in 1 U.S.C. Sec. 3: "The word 'vessel' includes every description of water-craft or other artificial contrivance used, or capable of being used, as a means of transportation on water." His position is that capability of transportation is the only test for 905(b) claims and that the tests for Jones Act claims[2] are different and inapplicable.

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[2]A Jones Act seaman must satisfy the following criteria:

> ...(1) he must have a more or less permanent connection with (2) a vessel in navigation and (3) the capacity in which he is employed or the duties which he performs must contribute to the function of the vessel, the accomplishment of its mission or its operation or welfare in terms of its maintenance during its movement or during anchorage for its future

The appellee contends that the test for vessel status in all maritime claims is the same: whether or not the design and use of a water-borne structure is for navigation and commerce. Obviousiy, the test incorporates the requirement that a craft be capable of transportation on water. *The Robert W. Parsons*, 191 U.S. 17, 24 S.Ct. 8, 48 L.Ed 73 (1903); *Bernard v. Binnings Const. Co., Inc.*, 741 F.2d 824 (5th Cir. 1984).

The *Bernard* court made no distinction between the criteria for vessel status in the Jones Act and the general maritime law[3] and determined that the small, raft-like structure, a "work punt", at issue was not a vessel.

The Fifth Circuit had recognized in *Offshore v. Robison*, supra, and later in *Cook v. Belden Concrete Products, Inc.*, 472 F.2d 999 (5th Cir. 1973) and *Bernard v. Binnings Const. Co. Inc.*, supra, that such special purpose vessels as submersible drilling barges and floating dredges *designated for navigation and commerce* are vessels within the general maritime jurisdiction. The *Bernard* court distinguished three common factors in cases where special purpose water-borne structures were determined *not* to be vessels:

> ...(1) the structures involved were constructed and used primarily as work platforms; (2) they were moored or otherwise secured at the time of the acci-

---

trips . . . . [Citations omitted.]
Bernard v. Binnings Const. Co., Inc., supra, at 827.

[3]This finding was noted with approval in *Richendollar v. Diamond M Drilling Co., Inc.*, 819 F.2d 124 (5th Cir. 1987).

> dent; and (3) although they were capable of movement and were sometime moved across navigable waters in the course of normal operations, any transportation function they performed was merely incidental to their primary purpose of serving as work platforms . . . . *Bernard v. Binnings Const. Co., Inc.*, supra, at 831.

The testimony at trial indicates that the pontoons were rectangular, built of metal with a depth of two feet. They had no living quarters, bilge pumps, below deck storage, navigation lights or motive power. They were used only in Avondale's Quick Repair facility in a section of the Harvey Canal that is about 1,000 feet in length. The pontoons were used as work platforms which were slipped under the overhangs of boats for repair or overhaul. They were pulled in and out of position either by hand-held ropes or by a crane on the facility's train track. They could carry as much as a ton of equipment or such parts of ships as propellors or anchors but carried no cargo and were only moved about within the facility waters from job to job.

The purpose and use of the pontoons was that of work platforms for repairs, and any "transportation" was incidental to that function. Accordingly, we find the trial court correctly determined that the structures were not vessels and the appellant cannot maintain a claim under 33 U.S.C. 905(b). Having found Orgeron has failed to prove the prerequisite for his maritime tort claim, we pretermit consideration of the negligence claim against Avondale.

For the reasons assigned above, the judgment appealed from is affirmed.

AFFIRMED

Appendix E

Ellis J. DUCREPONT,
Plaintiff-Appellant,
v.
BATON ROUGE MARINE ENTERPRISES, INC., Et Al.,
Defendants-Appellees.

No. 87-3632.
United States Court of Appeals,
Fifth Circuit.
July 18, 1989.
Rehearing and Rehearing En Banc
Denied Sept. 5, 1989.

Ship repairer brought negligence action to recover for injuries sustained when he slipped on ladder while leaving barge after performing repair work. The United States District Court for the Eastern District of Louisiana at New Orleans, Martin L.C. Feldman, J., 666 F.Supp. 882, granted summary judgment as to Jones Act and maritime claims and dismissed Longshore and Harbor Workers' Compensation Act claim after bench trial. On appeal, the Court of Appeals, Gee, Circuit Judge, held that: (1) structure could be nonvessel for Jones Act purposes even if it did not meet all criteria common to structures previously found not to be Jones Act vessels, and (2) district court should have ruled that barge did not meet definition of "vessel" under Longshore and Harbor Workers' Compensation Act as well as under Jones Act.

Affirmed.

1. Seamen←2
   Shipping←84(1)
   To qualify as seaman under Jones Act or general maritime law, plaintiff must show that he was

permanently assigned to or performed substantial part of his work aboard vessel; similarly, for purposes of vessel negligence claim under Longshore and Harbor Workers' Compensation Act, plaintiff must show that he was injured as a result of negligence of vessel. Jones Act, 46 U.S.C.A.App. §688; Longshore and Harbor Workers' Compensation Act, § 5(b), 33 U.S.C.A. § 905 (b).

2. Shipping←1
Structure may be nonvessel for Jones Act purposes even if it fails to meet each criteria common to structures previously found not to be Jones Act vessels. Jones Act, 46 U.S.C.A.App. § 688.

3. Shipping←1
Barge that was used primarily as work platform but was not constructed as such, that performed any transportation function merely incidentally to its primary purpose of serving as work platform, and that was moored at time of accident was not "vessel" for Jones Act purposes. Jones Act, 46 U.S.C.A.App. § 688.

4. Shipping←1
Barge that was originally navigable but was firmly moored to provide painting services, that was seldom moved, and that required assistance of motorized vehicle when it was moved was not "vessel" within meaning of Longshore and Harbor Workers' Compensation Act. Longshore and Harbor Workers' Compensation Act, § 5(b), 33 U.S.C.A. § 905(b).

See publication Words and Phrases for other judicial constructions and definitions.

Terrence J. Lestelle, Donald G. Kelly, New Orleans, La., for plaintiff-appellant.

Elton E. Duncan, III, Lawrence E. Abbott, New Orleans, La., for Baton Rouge Marine & Employers Ins.

Frederick T. Haas, III, Robert E. Durgin, New Orleans, La., for Commercial Union Ins.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before GEE, SMITH, and DUHE, Circuit Judges.

GEE, Circuit Judge:

Plaintiff filed suit against his employer, Baton Rouge Marine Enterprises, Inc. (Marine), and its insurers, seeking recovery under the Jones Act and general maritime law or, alternatively, under Section 5(b) of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §905(b). The defendant moved for summary judgment on the ground that the barge was not a vessel under either the Jones Act or § 905(b) and that the plaintiff was, therefore, limited to compensation recovery under the general provisions of the LHWCA. The district court, 666 F.Supp. 882, concluded that as a matter of law the structure upon which the plaintiff was injured was not a vessel under the Jones Act or general maritime law. The district court therefore dismissed the plaintiff's Jones Act/general maritime law claims. The district court also concluded, however, that summary judgment as to

the structure's status as a vessel under § 905(b) was inappropriate. Consequently, the district court permitted the §905(b) claim to proceed.

Following a bench trial, the district court granted the defendant's Rule 41(b) motion to dismiss the plaintiff's § 905(b) claim. The court assumed without deciding that the structure on which the plaintiff was injured was a vessel under § 905(b), but held that the 1984 amendments to the LHWCA barred the plaintiff's negligence claim against his employer. We disagree with the district court's assumption that the structure upon which the plaintiff was injured was a vessel under § 905(b). The district court therefore correctly dismissed the plaintiff's § 905(b) claim, although for the wrong reason. Consequently, we affirm the judgment of the district court.

I. *Facts*

The defendant was in the business of cleaning, repairing and fleeting barges for a variety of companies. The plaintiff, an employee of the defendant, was allegedly injured when he slipped and fell while leaving his employment aboard a barge owned by the defendant. This barge, originally designed as a cargo barge, was used as a stationary work platform from which the defendant conducted its repairing and cleaning operations. The barge housed two boilers used to clean neighboring barges, had no means of self-propulsion, and was usually moored to the shore by wires. On occasion the barge was tugged a short distance from shore due to the level of the water.

The plaintiff was vice-president of supervision. His duties included overseeing the cleaning and repair activities conducted by the defendant, performing office work and

maintaining one of the barge's boilers. The plaintiff spent approximately seventy percent of his working time aboard the barge engaged in one of these activities. In addition, he spent somewhere between ten and fifteen percent of his total employment running a tug for the defendant in furtherance of the cleaning and repair activities. The tug was used to move barges which the defendant was servicing to the work platform for cleaning and repair. It was also used to move the work platform in-river when necessary. The barge was not used during the last month of the plaintiff's employment. In its place the plaintiff used one of several small boats.

The plaintiff contends that the barge had a regular crew of which he was a member. Lunches were prepared and served on board. All those performing work on the barge, however, commuted to work. The barge was equipped with lights that could be used to mark its location for vessels travelling on the river. It was not, however, equipped with navigational lights or equipment. During the time the defendant was in business the barge was never moved from its location of the bank of the Mississippi River and never underwent a United States Coast Guard marine inspection.

II. *Discussion*

A. Vessel status under the Jones Act/General Maritime Law and Section 5(b).

[1] To qualify as a seaman under the Jones Act or General Maritime Law the plaintiff must show that he was permanently assigned to or performed a substantial part of his work aboard a vessel. *See Barrett v. Chevron, U.S.A., Inc.*, 781 F.2d 1067 (5th Cir. 1986) (en banc).

> Similarly, for purposes of a § 905(b) vessel negligence claim under the LHWCA, a plaintiff must show that he was injured as a result of the negligence of a vessel. *See Rosetti v. Avondale Shipyards, Inc.*, 821 F.2d 1083 (5th Cir.1987) *cert. denied* -U.S.- 108 S.Ct. 703, 98 L.Ed.2d 654 (1988). In this case the district court held that the barge on which the plaintiff was injured was, as a matter of law, not a Jones Act vessel, but that the barge *was* a vessel for § 905(b) purposes. Consequently, the district court granted summary judgment for the defendant on the plaintiff's Jones Act claim but denied summary judgment on the plaintiff's §905(b) claim.

We have consistently held "that dry docks and analogous structures whose primary purpose is to provide a work platform, even if the structures are afloat, are not Jones Act vessels as a matter of law." *Bernard v. Binnings Construction Co., Inc.*, 741 F.2d 824, 830 (5th Cir.1984). *See, also, Watkins v. Pentzien, Inc.*, 660 F.2d 604 (5th Cir.1981) and *Waguespack v. Aetna Life & Casualty Co.*, 795 F.2d 523 (5th Cir.1986). In *Bernard* the court noted that:

> A review of ... [decisions holding that floating work platforms are not vessels] indicates three factors common to them: (1) the structures involved were constructed and used primarily as work platforms; (2) they were moored or otherwise secured at the time of the accident; and (3) although they were capable of movement and were sometimes moved across navigable waters in the course of normal operations, any transportation function they performed was merely

incidental to their primary purpose of serving as work platforms. *Bernard*, 741 F.2d at 831.

[2,3] The barge at issue in this case was used primarily as a work platform. Additionally, it was moored at the time of the accident; and any transportation function it performed was merely incidental to its primary purpose of serving as a work platform. It was not, however, constructed as a work platform. Nonetheless, the district court correctly concluded that the barge was not a vessel for Jones Act purposes. *Bernard* did not attempt to set forth minimum criteria necessary to place a floating structure outside the scope of the definition of "vessel" under the Jones Act. Rather, it merely listed criteria common to structures previously found not to be Jones Act vessels. To require that a structure meet each criterion in order to qualify as a non-vessel under the Jones Act would result in the conclusion that two identical structures engaged in identical work, one of which was constructed as a work platform and one constructed as a barge, had different vessel status under the Jones Act. We do not believe that such an absurd result is required by *Bernard*. We therefore hold that a structure may be a non-vessel for Jones Act purposes even if it fails to meet each criterion noted in *Bernard* and affirm the district court's conclusion that the barge was not a Jones Act vessel.

[4] In assuming that the barge was a vessel under § 905(b), the district court relied on our decision in *Burks v. American River Transportation Company*, 679 F.2d 69, 75 (5th Cir.1982). In *Burks* we held that the definition of vessel set forth in Title 1 of the United States Code, § 3, provides the meaning of vessel "as the term is used in the LHWCA." This section states: "The word 'vessel' includes every description of watercraft or other artificial contrivance used, or capable of

being used, as a means of transportation on water."

Had this holding been our last pronouncement on the definition of the term "vessel" as used in the LHWCA, the district court's ruling that the barge was a vessel under § 905(b) would have been sustainable. Before trial in this case, however, we handed down our decision in *Davis v. Cargill, Inc.*, 808 F.2d 361, 362 (5th Cir.1986). In *Davis* we held that for purposes of § 905(b), "As a matter of law, a floating dry dock is not a vessel *when it is moored and in use as a dry dock.*" (citations omitted) (emphasis in original)

> In reaching this conclusion we stated: Although the plaintiff was injured while on a work platform and not a dry dock, the similarities between the two compel our holding that this platform, like a moored dry dock used for that purpose, is not a vessel within the meaning of § 905(b). *According to the affidavits submitted to the district court by the defendants, the platform was originally a navigable surplus dry cargo barge. It has since been converted for use as a permanently moored platform from which painting and sandblasting services are provided to barges and is no longer designed or used for navigation. The platform is anchored to the riverbed, and is moved only once or twice a year to compensate for tide changes, and even then, ... cannot be moved without the assistance of motorized vessels. The district court therefore properly granted summary judgment in favor of the defendants on the ground that the work platform on which the plaintiff was injured was not a 'vessel' within the meaning of § 905(b)." Id.* at 362. (emphasis added)

The similarities between the *Davis* case and the instant

case are many and obvious. The barge in this case, like the platform in *Davis*, was originally a navigable barge. Both were firmly moored to provide painting services, were not used for navigation, were seldom moved, and when moved required the assistance of a motorized vessel. Therefore, under *Davis* it is clear that the barge on which the plaintiff was injured was not a vessel within the meaning of §905(b).

Further, before the entry of judgment in this case we had issued our opinion in *Richendollar v. Diamond M Drilling Co.*, 819 F.2d 124, 125 (5th Cir.1987) (en banc), in which we held that "in order for a waterborne structure to qualify as a 'vessel' under § 905(b), it must be a vessel for purposes of maritime jurisdiction." As is noted above, the barge in this case is not a vessel under general maritime law. Consequently, under our holding in *Rosetti* it cannot be a vessel for purposes of § 905(b). The district court, therefore, erred in denying the defendant's motion for summary judgment on the plaintiff's § 905(b) claim.

Because we find that the district court erred in denying the defendant's motion for summary judgment, we need not consider the plaintiff's contention that the court erred in granting the defendant's Rule 41(b) motion to dismiss. The judgment of the district court is, therefore,
AFFIRMED.

Appendix F

Grace G. FLEMING, et al.

v.

PORT ALLEN MARINE SERVICE, INC. and ABC Company.

Civ. A. No. 82-29-B.
United States District Court,
M.D. Louisiana.

Dec. 9, 1982.

Tutrix of sole surviving child of welder brought action against employer for its alleged negligence in causing the welder's death and against an unidentified owner of barge being repaired. The District Court, Polozola, J., held that exclusive remedy of tutrix was under Longshoremen's and Harbor Workers' Compensation Act.

Suit dismissed.

1. Workers' Compensation ←262, 2085

Small floating work platform adjacent to dry dock upon which welder was working at time of his death was not primarily designed to serve in navigation; thus, platform was not a "vessel," and exclusive remedy of tutrix of welder's sole surviving child was under the Longshoremen's and Harbor Workers' Compensation Act. Longshoremen's and Harbor Workers' Compensation Act, §§ 1 et seq., 5(a, b), 33 U.S.C.A. §§ 901 et seq., 905(a, b).

2. Federal Civil Procedure ←392

Although in action to recover damages arising from death of welder, owner of barge being repaired

was unidentified but named as defendant, district court would give plaintiff 15 days from date of opinion within which to amend complaint to name proper defendant.

Stanley K. Hurder, Baton Rouge, La., for plaintiffs.

Edward F. Kohnke, IV, New Orleans, La., for defendants.

POLOZOLA, District Judge.

This matter is before the court on the motion of the defendant, Port Allen Marine Service, Inc. (PAM), for summary judgment. No oral argument is required on this motion.

The plaintiff, Grace G. Fleming, filed this action as tutrix of Renata M. Gibson, the sole surviving child of Leroy Moore, who drowned while working as a welder for PAM at PAM's barge and towboat repair facility. While standing on a small floating work platform adjacent to the drydock which was holding a vessel upon which he was performing repair work, Moore fell overboard and drowned. The plaintiff has sued PAM for its alleged negligence in causing Moore's death and has also sued the unidentified owner of the barge being repaired, which was denominated as the ABC Company in plaintiff's complaint.

PAM has now filed a motion for summary judgment. PAM contends plaintiff's suit should be dismissed on the ground that plaintiff's sole remedy against PAM is under the Longshoreman and Harbor Worker's Compensation Act, Title 33, U.S.C. Section 901 et seq. Compensation has been

awarded to the plaintiff by an administrative law judge pursuant to the LHCA and PAM has complied with the order. Thus, PAM argues that plaintiff's suit for negligence is barred by 33 U.S.C. § 905(a). The principal issue raised by the plaintiff in opposition to this motion is whether the structure upon which Moore was working when he drowned may be properly characterized as a "vessel". If the structure is a vessel, plaintiff may bring this suit under 33 U.S.C.§905(b).

For reasons which follow, the Court finds that the structure on which Moore was working at the time of his death is not a vessel. Therefore, plaintiff has no claim for negligence against PAM. 33 U.S.C. § 905(a).

PAM maintains a shipyard on the Intercoastal Waterway near Port Allen, Louisiana, for the construction of new barges and the repair and cleaning of barges and other vessels. Moore worked at this facility as a tacker. At the time of his death he had been working either upon a small floating work flat or a nearby drydock. For purposes of this motion the Court will assume that Moore was on the work platform or pontoon when his accident occurred. There is no dispute that Moore met the status and situs requirements of the LCHA and was a covered employee of PAM under that Act. The only issue before the Court is the legal characterization of the work flat.

The work flat in question was a steel structure which measured approximately 20 feet in length by 12 feet in width by 28 inches in depth. It had no self-propulsion system, no navigation lights, and no means to store materials below deck. The work flat was not equipped with any hatches, and had only two small openings in the deck to facilitate removal of water from its interior. It was used solely to provide an auxiliary work surface for use in PAM's ship repair activities. In this

role the work flat did hold men and materials on the water. Its primary role was to serve as a place for welders to stand as they repaired ships. When movement of the structure was required, the flat was pulled around the PAM shipyard by a tugboat. However, the flat never left the PAM facility and was used exclusively within PAM's shipyard.

The Court must begin its consideration of the applicable law by reviewing the often-cited case of *Offshore Co. v. Robison*, 266 F.2d 769, 779-780 (5 Cir. 1959), a Jones Act case which provided:

"Attempts to fix unvarying meanings have [sic] a firm legal significance to such terms as 'seamen', 'vessel', 'member of a crew' must come to grief on the facts. These terms have such a wide range of meaning, under the Jones Act as interpreted in the courts, that, except in rare cases, only a jury or trier of facts can determine their application in the circumstances of a particular case. Even where the facts are largely undisputed, the question at issue is not solely a question of law when, because of conflicting inferences that may lead to different conclusions among reasonable men, a trial judge cannot state an unvarying rule of law that fits the facts."

However, despite the above language, the Fifth Circuit has not hesitated to affirm lower court decisions which granted summary judgment with respect to vessel status where it was warranted. E.g. *Atkins v. Greenville Shipbuilding Corp.*, 411 F.2d 279 (5 Cir.) cert. denied 396 U.S. 846, 90 S.Ct. 105, 24 L.Ed.2d 96 (1969); *Cook v. Belden Concrete Products, Inc.*, 472 F.2d 999 (5 Cir.) cert. denied 414 U.S. 868, 94 S.Ct. 175, 38 L.Ed.2d 116 (1973). The *Atkins* and *Cook* cases are particularly applicable to the issue now before

the Court.

In *Atkins v. Greenville Shipbuilding Corp.*, supra, the Fifth Circuit held as a matter of law that a floating drydock was not a vessel. The Court affirmed a summary judgment which had been rendered against a welder covered by the LHCA who tried to escape the exclusive remedy provision of § 905(a) by relying on the unseaworthiness doctrine set forth in *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099 (1946). In holding the floating drydock was not a vessel the Fifth Circuit stated: "Mere flotation on water does not constitute a structure a 'vessel' for purposes of salvage nor warranty of seaworthiness. The elements of risk and exposure to the hazards of the sea, necessary for the operation of and common to both principles, is absent upon floating drydocks." 411 F.2d at 283.

The plaintiff in *Cook v. Belden Concrete Products, Inc.*, supra, was injured while working on a floating construction platform upon which concrete barges were fabricated. The platform measured 180 feet by 54 feet, had no motive power, and was equipped with pipes and pumps to facilitate flooding its interior compartments for the purpose of submerging the platform and launching the completed barges manufactured upon it. The flat deck barge was occasionally moved to different positions along its owner's dock to pick up materials. After a set of barges was completed, the deck barge would be towed into deeper water to launch the completed barges. The plaintiff in *Cook* contended that *Atkins* did not control because the platform in *Cook* was capable of limited movement and was, in the normal course of its service, towed from point to point in the navigable waters off the defendant's yard. However, the Fifth Circuit held that permanence of fixation is not the criterion governing the status of floating dry

docks and similar structures. Quoting from *The Robert W. Parsons*, 191 U.S. 17, 30, 24 S.Ct. 8, 12, 48 L.Ed. 73 (1903), the Fifth Circuit stated that "the 'determinative factors upon the question of jurisdiction [are] the purpose for which the craft was construed and the business in which it is engaged.'" 472 F.2d 1011. After reviewing the record the court held that the platform was not designed for transportation of passengers, cargo, or equipment across navigable waters. The court also found that although some movement was necessarily a part of the regular operation of the structure, the capability to sustain such movement did not establish that the craft was constructed for the purpose of navigation. Under the facts of the case, the court in *Cook* found as a matter of law that the platform was not a vessel.

As in the *Cook* case, this Court finds as a matter of law that the structure upon which Moore was working at the time of his death was not a vessel.

A careful review of decisions from other circuits and from district courts within the Fifth Circuit also support the Court's conclusion. Thus, in *Powers v. Bethlehem Steel Corporation*, 477 F.2d 643 (1 Cir.) cert. denied, 414 U.S. 856, 94 S.Ct. 160, 38 L.Ed.2d 106 (1973) a Jones Act plaintiff was injured upon a 25 by 5 foot "raft" or "float". Workmen used the float as a place to stand while they chipped, sandblasted and poured concrete around piles in water. The workmen would move the float from its docking at a pier to the worksite by poling or pulling on lines. The float was used to carry the workmen and their equipment to the worksite. The First Circuit affirmed the judgment of the lower court which found the float was not a vessel, stating:

... A stage designed to be used in connection with

painting or repairing the side of a vessel would not become [a vessel] merely because it was capable of floating on the water, though it were used by workmen in thus painting and repairing, while the same was on the water, rising and falling with the tide, or because it could be moved alongside or around such vessel, and while being moved was capable of holding persons and property. . . .

* * * * * * *

The purpose and business of the present craft was not the transportation of passengers, cargo, or equipment from place to place across navigable waters. It was tied to the pier or its pilings virtually all of the time. Nearly as long as the pier was wide, it was used to provide a stable platform for men repairing defective piles. While so used, it was lashed with the other raft to piles, planks being placed from raft to raft, and was indistinguishable from a permanent floating dock... Its occasional 'voyages' - when towed by workboat from one pier to another - were no different from the dragging of a section of floating dock from one location to another. 477 F.2d at 647.

See, also, *Buna v. Pacific Far East Line, Inc.*, 441 F.Supp. 1360 (N.D.Cal.1977); *Mayfield v. Wall Shipyard, Inc.*, 510 F. Supp. 605 (E.D.La.1981); *Berfect v. American Commercial Barges Lines*, 509 F.Supp. 734 (E.D.La.1981).

The plaintiff relies on *Slatton v. Martin K. Eby Construction Co., Inc.*, 506 F.2d 505 (8 Cir. 1974). However, the Court finds that the *Slatton* case is not applicable and is

distinguishable on its facts from the case now before this Court.

[1] In summary, the Court finds the platform upon which Moore was working at the time of his death was not primarily designed to serve in navigation. Therefore, the Court finds as a matter of law that the platform is not a vessel. Thus, plaintiff's exclusive remedy against PAM is under the Longshoreman & Harbor Worker's Compensation Act. For these reasons, PAM's motion for summary judgment will be granted.

[2] The plaintiff has also sued another defendant as the ABC Company. This defendant has not been named or served with the complaint. Ordinarily, the Court would dismiss a suit against an unnamed, unserved "ABC Company" defendant. However, the Court will give plaintiff 15 days from the date of this opinion within which to amend the complaint to name the proper defendant herein. If the plaintiff fails to amend the complaint within 15 days, the Court shall dismiss plaintiff's suit in its entirety.

Therefore:

IT IS ORDERED that the motion of Port Allen Marine Services, Inc. for summary judgment be and it is hereby GRANTED.

IT IS FURTHER ORDERED that plaintiff shall have 15 days from the date of this order to amend the complaint to name the proper defendant herein for the "ABC Company". If plaintiff fails to timely amend the complaint as required by this order, plaintiff's suit shall be dismissed in its entirety.

Appendix G

Victoria Ann Joseph MAYFIELD, Individually and as personal representative of decedent, Keith Mayfield, and for and on behalf of her minor child Jeannine Marie Mayfield

v.

WALL SHIPYARD, INC. and Aetna Life and Casualty Company

Civ. A. No. 80-2298.
United States District Court,
E.D. Louisiana.

March 4, 1981.

An action was brought under the Longshoremen's and Harbor Workers' Compensation Act to recover damages for injuries caused by alleged vessel negligence. The District Court, Duplantier, J., held that: (1) the steel pontoon upon which an explosion occurred was not a "vessel," where it was not designed for use as a vessel and was not being used as a vessel; (2) even if the pontoon were a vessel, the widow did not carry the burden of proving that decedent's death was caused by the employer's negligence as a vessel owner; and (3) the widow failed to establish that the decedent's death was caused by vessel negligence.

Judgment for defendants.

1. Shipping←84(3 1/4)
   In action to recover under section of Longshoremen's and Harbor Workers' Compensation Act for injury caused by negligence of vessel, threshold question is whether pontoon on which decedent was standing at time of accident

was "vessel." Longshoremen's and Harbor Workers' Compensation Act §§ 1 et seq., 5(b), 33 U.S.C.A. §§ 901 et seq., 905(b).

2. Shipping←84(3 1/4)
For purposes of action to recover under Longshoremen's and Harbor Workers' Compensation Act section allowing recovery for negligence of vessel, steel pontoon float upon which accident occurred was not "vessel," where pontoon was not designed for use as vessel and was not being used as vessel. Longshoremen's and Harbor Workers' Compensation Act §§ 1 et seq., 5(b), 33 U.S.C.A. §§ 901 et seq., 905(b).

See publication Words and Phrases for other judicial constructions and definitions.

3. Shipping←84(1)
Under section of Longshoremen's and Harbor Workers' Compensation Act section allowing recovery for injury caused by negligence of vessel, employee can sue vessel upon which he is injured, even though owner of that vessel was also his employer, and for employer shipowner to be liable, injury must be attributable to him in his capacity as vessel owner, not as ship repairer or builder. Longshoremen's and Harbor Workers' Compensation Act §§ 1 et seq., 5(b), 33 U.S.C.A. §§901 et seq., 905(b).

4. Shipping←84(1)
In action under Longshoremen's and Harbor Workers' Compensation Act section allowing recovery

for injury caused by negligence of vessel, where widow of decedent did not carry burden of proving that decedent's death was caused by employer's negligence as "vessel owner," employer would not be liable even if pontoon upon which explosion occurred was vessel. Longshoremen's and Harbor Workers' Compensation Act §§ 1 et seq., 5(b), 33 U.S.C.A. §§ 901 et seq., 905(b).

5. Negligence←10
Cornerstone of doctrine of negligence is behavior which should be recognized as involving unreasonable danger to others; there must be foreseeable risk that injury will occur, sufficiently great to lead reasonable person to anticipate and guard against it; in absence of such foreseeability, there is no negligence.

6. Shipping←86(2 3/4)
In action under Longshoremen's and Harbor Workers' Compensation Act section allowing recovery of injuries caused by negligence of vessel, evidence established that any negligence of deceased's employer would be shipyard negligence, rather than vessel negligence, where alleged escape of gas from ship repair equipment was not connected in any way to employer's ownership of pontoon upon which explosion occurred. Longshoremen's and Harbor Workers' Compensation Act §§ 1 et seq., 5(b), 33 U.S.C.A. §§ 901 et seq., 905(b).

7. Shipping←84(1)
In action under Longshoremen's and Harbor Workers' Compensation Act section allowing recovery

for injuries caused by negligence of vessel, vessel negligence could not be based upon employer's failure to inspect pontoon and insure its safety, before it was used by decedent, where there was no foreseeable risk that gas could accumulate in compartments of pontoon and cause explosion. Longshoremen's and Harbor Workers' Compensation Act §§ 1 et seq., 5(b), 33 U.S.C.A.§§901 et seq., 905(b).

8. Shipping←86(2 3/4)
In action under Longshoremen's and Harbor Workers' Compensation Act section allowing recovery for injuries caused by negligence of vessel, widow failed to prove by preponderance of evidence that cause of explosion was gas which had accumulated below deck of pontoon, and, therefore, it had not been established that explosion had connection with "vessel," and there could be no vessel negligence. Longshoremen's and Harbor Workers' Compensation Act §§ 1 et seq., 5(b), 33 U.S.C.A. §§ 901 et seq., 905(b).

David E. Caruso, Jr., Law Offices of Frederick J. Gisevius, Jr., New Orleans, La., for plaintiffs.

Bert M. Cass, Jr., A. Wendel Stout, Deutsch, Kerrigan & Stiles, New Orleans, La., for defendant Wall Shipyard.

Lloyd W. Hayes, Adams & Reese, New Orleans, La., for defendant Aetna Life and Casualty Co.

DUPLANTIER, District Judge.

Plaintiff, Victoria Ann Mayfield, brought this suit as personal representative and widow of Keith Mayfield, on behalf of herself and her minor child. Keith Mayfield was killed in an accident which occurred while he was working for defendant Wall Shipyard, Inc. Plaintiff asserted claims against Wall and its insurer under the Jones Act and 33 U.S.C. § 905(b), in the alternative. The court granted a motion for summary judgment filed by the defendants on the Jones Act claim, holding that the decendant was not a member of a crew of a vessel and therefore not entitled to the protection afforded by the Jones Act. The claim under 33 U.S.C. § 905(b) was tried to the court without a jury.

[1] The threshold question is whether the pontoon on which the decedent was standing at the time of the accident was a vessel. To assert a 905(b) claim the injury must have been caused by the negligence of a vessel. Unless the pontoon was a vessel, there is no basis for asserting a claim under 905(b); plaintiff's only claim would be under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq., under which she is receiving benefits. Because we find that the pontoon in question was not a vessel, plaintiff's suit must be dismissed.

[2] The structure at issue was a steel pontoon float, approximately twenty feet long, six to ten feet wide and four feet deep. It had no means of self-propulsion, no navigation lights, no equipment, no anchors, no raked bow, no railings, no crew quarters, no feeding facilities and no bilge pumps. It had no hatches, and nothing was ever stored beneath its deck. The only access to the area below the deck was through two small holes into which hoses could be inserted to pump out water

which might accumulate below deck. It was simply a rectangular steel floating platform which was shaped like a matchbox.

The two most important factors in determining whether a structure is a vessel are the purpose for which the craft is constructed and the business in which it is engaged. *Blanchard v. Engine & Gas Compressor Services, Inc.*, 575 F.2d 1140 (5th Cir. 1978); *Hicks v. Odeco*, 512 F.2d 817 (5th Cir. 1975). The pontoon was not designed for use as a vessel but rather only to facilitate the repair of ships and barges at the dry dock facility. The structure was not used as a vessel. It had two principal uses: to serve as an extension of a dry dock to allow access to those portions of barges being repaired which extended beyond the dry dock work surface, and to move material from one location to another within the shipyard.[1] The pontoon had never travelled outside of the shipyard and was never moved with men on it. To get on the pontoon, workers would walk to the end of the dry dock and step on the pontoon after it had been moved to the area of the dry dock where it was needed, usually the end of the dry dock.

In its barge and boat repairing business, defendant uses nine of these pontoons, all of which it built itself. One or more is usually stationed near each of its five dry docks. These pontoons have several characteristics of a typical barge used in commerce, the type which clearly is a 905(b) or Jones Act

---

[1]On the occasion of the accident which caused plaintiff's death, the pontoon was being used to move steel plates from the dock area to the side of the barge under repair; the plates were too heavy and cumbersome to move through the dry dock area.

vessel: they float, they can be moved by use of a "tug" (in this case a work boat, often a small 20 foot boat), and as noted previously, they are periodically used to carry on their decks material such as steel plates from one location in the shipyard to another, a distance usually of less than two hundred feet. Such similarities are not sufficient, however, to classify these pontoons as "vessels" within the provision of § 905(b) or the Jones Act.

Considering the totality of the physical characteristics of the pontoon, its intended purpose, and the business it was engaged in, the court concludes that the structure on which the decedent was standing at the time of the accident was not a vessel.

[3] Even if the court were to find that the pontoon in question was a vessel, the plaintiff's suit would have to be dismissed, because she has failed to carry the burden of proving vessel negligence. Under 905(b), an employee can sue the vessel on which he is injured, even though the owner of that vessel was also his employer. *Smith v. Captain Fred*, 546 F.2d 119 (5th Cir.1977). For the employer/shipowner to be liable under 905(b), the injury must be attributable to him in his capacity as vessel owner, not as ship repairer or builder. 33 U.S.C. § 905(b). The distinction is between vessel negligence and shipyard negligence.

[4] For the purposes of the plaintiff's 905(b) claim, defendant Wall Shipyard wears two hats: it is the owner of the pontoon on which the accident occurred and it is the operator of the shipyard by which the decedent was employed. Because plaintiff has not carried the burden of proving that the decedent's death was caused by its negligence as a "vessel" owner, Wall Shipyard would not be liable under 905(b) even if the pontoon

were a vessel.

[5] The cornerstone of the doctrine of negligence is behavior which should be recognized as involving unreasonable danger to others; there must be a foreseeable risk that the injury will occur, sufficiently great to lead a reasonable person to anticipate and guard against it. In the absence of such foreseeability, there is no negligence.

[6] The exact chain of events leading up to the accident in this case is unclear. The only expert who testified, a chemist employed by defendant Aetna, speculated that flammable gases or vapors may somehow have leaked into the compartments of the pontoon, though "how or when it may have entered the compartment is not known" (Plaintiff's Exhibit 7, p. 4). If the expert's speculation is accepted that the explosion was caused by the ignition of gas which had accumulated in the compartments below the deck of the pontoon, that accumulation would have been the result of Wall's actions as a shipyard operator, not as a "vessel" owner. The area below the deck of the pontoon was never used to carry anything. The probable sources of the gas were manifolds or hoses containing MAPP, a gas used for burning and cutting metal in the ship repair operation. Both the manifolds and the hoses are pieces of equipment which were used by Wall in their capacity as shipyard operators. Any negligence would be shipyard negligence, for which Wall would not be liable under 905(b). The alleged escape of the gas from the ship repair equipment is not connected in any way to Wall's ownership of the pontoon on which the explosion occurred.

[7] Plaintiff would contend that Wall's "vessel" negligence lies in its failure to inspect the pontoon and insure its safety, before it was used by the decedent. For Wall to owe this

duty to inspect, there must be a foreseeable risk that the gas could accumulate in the compartments of the pontoon and cause the explosion. That foreseeability does not exist in this case. As "vessel" owner, Wall had no way of anticipating that gas might accumulate in the pontoon. The only openings on the pontoon through which the gas might enter the compartments were the two eight inch holes on the deck. The likelihood that a particularly malodorous gas could escape from the ship repair equipment and enter the compartments in sufficient quantity to create a risk of explosion and yet not be detected by its odor, is not sufficiently great to lead a reasonable man to anticipate and guard against it. This tragic explosion was a freak accident which Wall as vessel owner could not have foreseen, and therefore owed no duty to guard against.

[8] Moreover, plaintiff has failed to prove by a preponderance of evidence that the cause of the explosion was gas which had accumulated below the deck of the pontoon. There are not sufficient facts proven for the court to hold that the cause of the explosion was gas which had accumulated in the hold. The speculation that this was the cause of the explosion is based on the chemist's examination of the pontoon in the scrap yard after it had been retrieved from the canal where it had sunk after the explosion. The chemist speculated that the explosion of the gases in the compartment of the pontoon caused the deck of the larger compartment to be separated from the pontoon.

While it is certainly a possibility that the explosion was caused by the accumulation of gas in the hold, the plaintiff has failed to carry the burden of proving that this was the cause. The deck of the pontoon could have come off when the pontoon was being raised after it sank or while it was being

towed before the sinking; there is no proof that it came off as a result of the explosion. It is just as likely that the explosion was caused by the ignition of MAPP in the air in the vicinity of the pontoon. At the time of the explosion the fuel gas was being used in cutting and burning operations on the barge at the dry dock where the pontoon was stationed. The explosion occurred as soon as the decedent commenced his electric welding operation, while he was standing on the deck of the pontoon. Thus the fumes or vapors which ignited may have been in the air around the pontoon, rather than inside of it. In this situation the explosion would have had no connection with the "vessel", except that the pontoon served as the situs. Thus there would be no "vessel" negligence. Claims under 905(b) cannot be based on strict liability. *Hess v. Upper Mississippi Towing Corp.*, 559 F.2d 1030 (5th Cir. 1977).

For the foregoing reasons, the plaintiff's sole remedy is under the compensation provisions of the Longshoremen's and Harbor Workers' Compensation Act, under which plaintiff is now receiving payments.

Supreme Court, U.S.
FILED
JUN 27 1990
JOSEPH F. SPANIOL, JR.
CLERK

NO. 89-1896

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

AVONDALE SHIPYARDS, INC.
Petitioner

VERSUS

CHESTER J. ORGERON, JR. and
his wife, CONNIE E. LYNN CAMUS ORGERON
Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF LOUISIANA

SUPPLEMENTAL BRIEF OF PETITIONER

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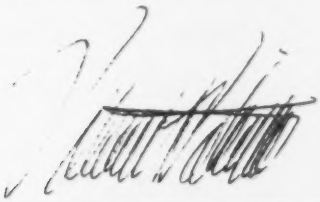
Petitioner Avondale Shipyards, Inc. submits this supplemental brief pursuant to Supreme Court Rule 15.7, in order to call this Court's attention to an intervening matter not available at the time of the filing of its original petition. Subsequent to the filing of its petition for writ of certiorari on June 6, 1990, Avondale Shipyards, Inc. learned that this Honorable Court granted certiorari on June 18, 1990, in McDermott International, Inc. v Jon C. Wilander, No. 89-1474.

In No. 89-1474, this Honorable Court will review the conflicting tests for seaman status developed by the circuits for purposes of Jones Act and general maritime law considerations. The present matter, No. 89-1896, seeks review of the conflict between the Louisiana Supreme Court and the federal courts as to the proper test that is to be applied to decide vessel status under general maritime law.

Vessel status under general maritime law is a part of the test for seaman status because a worker must qualify as a crewmember of a vessel to attain seaman status. As shown in Avondale Shipyards, Inc.'s petition, the general maritime law test for vessel status applies to seamen's claims as well as to general maritime law negligence claims such as the instant matter. Petitioner Avondale Shipyards, Inc. respectfully submits that it would be beneficial and logical for this Honorable

Court to grant certiorari in the present matter, No. 89-1896, and consolidate this case with No. 89-1474, so that the important questions of "vessel status" and "seaman status" can be resolved in a consistent and complementary manner.

Respectfully submitted,



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(3)

NO. 89-1896

Supreme Court, U.S.
FILED
JUL 5 1990
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In the Supreme Court of the United States

OCTOBER TERM, 1990

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ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF LOUISIANA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THIS COURT SHOULD ISSUE A WRIT OF CERTIORARI ON A QUESTION ALREADY AUTHORITATIVELY DECIDED BY CONGRESS.

II. WHETHER THE DECISION OF THE LOUISIANA SUPREME COURT IS IN CONFLICT WITH DECISIONS OF FEDERAL APPELLATE COURTS AND THIS COURT.

III. WHETHER THE DEFINITION OF VESSEL SET FORTH IN 1 U.S.C. §3 OR IN JONES ACT CASES UNDER 46 U.S.C. §688 GOVERNS THE ISSUE OF VESSEL STATUS UNDER SECTION 905(B) OF THE LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT, 33 U.S.C. §905(B).

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

AVONDALE SHIPYARDS, INC.
Petitioner

VERSUS

CHESTER J. ORGERON, JR., and
his wife. CONNIE E. LYNN CAMUS ORGERON
Respondent

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

DECISIONS BELOW

1. August 31, 1988, decision by trial court in favor of defendant (Petitioner's Appendix C).

2. April 12, 1989, decision by Louisiana Court of Appeal, Fifth Circuit, affirming trial court (542 So. 2d 640) (Petitioner's Appendix D).

3. February 5, 1990, decision by Louisiana Supreme Court, reversing and remanding for determination of vessel negligence issue (556 So.2d 582) (Petitioner's Appendix A).

4. March 8, 1990, denial of petition for rehearing by Louisiana Supreme Court (Petitioner's Appendix B).

STATEMENT OF THE CASE

Chester Orgeron, Jr., while working as a ship repairman for Avondale Shipyards, Inc., was seriously injured on the night of September 9, 1983, when he fell between an opening in two work barges. The barges at the time were afloat in navigable water alongside the No. 4 drydock in Avondale's Harvey Quick Repair Yard. The yard is in a slip in the Harvey Canal, which is part of the Intracoastal Waterways.

Orgeron brought this negligence action against Avondale Shipyards, Inc., under the provisions of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §905(b). Plaintiff claimed Avondale's negligence was its failure to equip the barges with securing equipment to permit them to be secured together.

Under section 905(b), Orgeron, since he is a covered employee under the LHWCA, can sue for the "negligence of a vessel" even though the owner of the vessel was his employer. *Jones & Laughlin Steel Corp. v. Pfeifer,* 462 U.S. 523, 103 S.Ct. 2541 (1983). The injury must, in part at least, be attributable to Avondale in its capacity as vessel owner. *Edmonds v. Compagnie Generale Transatlantigue,* 443 U.S. 256, 99 S.Ct. 2753, 2759 (1979).

The wording of section 905(b) of the Act in effect at the time of Orgeron's injury, and applicable to the present case, was as follows:

> In the event of injury to a person covered under this Act caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provision of Section 33 of this Act, and the employer shall not be liable to

> the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injuries were caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide shipbuilding or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing shipbuilding or repair services to the vessel.

In 1984, Congress amended section 905(b) to prohibit suits against a ship repairer vessel owner who is also the plaintiff's employer. Since this amendment applies only to injuries after September 28, 1984, it is not controlling here since the plaintiff was injured on September 9, 1983.

The above-quoted language of section 905(b), in effect at the time of Orgeron's accident, provides generally that a ship repairer or other maritime employee cannot sue his employer for the employer's negligence, but can sue the owner of a vessel whose negligence causes his injury. A special case occurs, however, when the employer is also the owner of the involved vessel. In such a case, the courts have recognized the "dual capacity" doctrine. The employer is immune from suit in its capacity as employer, but *is not immune if it was negligent in its role as vessel owner.* The employer/vessel owner is treated just as any other vessel owner. *Chiasson v. Rogers Terminal & Shipping Corp.*, 679 F.2d 410 (5th Cir., 1982); *Smith v. M/V Captain Fred*, 546 F.2d 119 (5th Cir. 1977). The rationale in *Smith* and subsequent cases is that an employee should not be "treated differently solely because the ship on which he is injured happens to be owned by his employer instead of by a third party."

Avondale defended on two grounds. Their first contention was that the work barges (or pontoons) were not vessels under 33 U.S.C. §905(b). Alternatively, Avondale urged that if the work barges (or pontoons) were vessels, then they were not negligent in their capacity as vessel owner.

The trial judge found that the barges were not vessels, applying a Jones Act, 46 U.S.C. §688, "design and use" test of vessel status to this non-Jones Act case. Judgment was entered in favor of Avondale Shipyards, Inc., and against the plaintiffs. (Petitioner's Appendix C at 2.)

The Louisiana Fifth Circuit Court of Appeal affirmed the lower court judgment on the basis that the work barges were not vessels under the Jones Act test. *Orgeron v. Avondale Shipyards, Inc.*, 542 So.2d 640 (La. App. 5th Cir. 1989). (Petitioner's Appendix D).

In its writ application to the Louisiana Supreme Court, plaintiff raised one issue only: whether the Court of Appeal committed legal error by holding that the Avondale work barges (or pontoons) were not vessels and by holding that the correct vessel test under section 905(b) was the Jones Act test instead of the "capability" test provided by 1 U.S.C. §3.

§3. "Vessel" as including all means of water transportation

> The word "vessel" includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.
> (July 30, 1947, ch 388, § 1, 61 Stat. 633.)

The Louisiana Supreme Court reversed, holding that the proper test of vessel status under section 905(b) was that provided in 1 U.S.C. §3, the "capability" test, and not that applied to Jones Act cases, the "design and use" test,

and that the barges in question were vessels under 1 U.S.C. §3. *Orgeron v. Avondale Shipyards, Inc.*, 556 So.2d 582, 585 (La. 1990) (Petitioner's Appendix A at 6-7).

The purpose of the Avondale Shipyard facility is the repair of vessels. Vessels to be repaired are placed on dry docks. When the vessels are raised on the dry dock, the bottom portion of the hull of the vessel, including the wheels, (or propellers) and rudders are removed and taken to the machine shop. To assist in the repair work, Avondale designed and built the work barges in question. R. at 291-292.

These barges are free-floating. R. at 294. They move over the water all around the yard. R. at 294. They are used to carry heavy equipment, including anchors and propellers, around the yard. R. at 292. When moving around the yard in the Harvey Canal they will sometimes have the workers' tools and equipment on them. R. at 297. The work barges (or pontoons) are used between the land dock and the dry dock and also on the Canal side of the Harvey Canal. R. at 331, 342.

The work barges had numerous other uses at the facility besides serving as work platforms. When the work barges were used on the Canal side of the facility, they would carry equipment from the boats on dry dock to the machine shop. R. at 247. The work barges travelled from one end of the yard to the other. R. at 264-265. Employees would ride on these barges when moved. R. at 252-253. They moved their equipment to the work site on these barges and they rode on them when the barges carried wheels and shafts to make certain that they would not fall off into the Harvey Canal. R. at 252-253. Shift boats on occasion would move the barges by tying up alongside them. R. at 253.

Sometimes the barges would break loose, since they were free-floating and not permanently attached to anything, and drift into the middle of the Harvey Canal. R. at 253. This was as a result of the mooring lines giving way. R. at 253. The barges would then have to be retrieved. R. at 254.

As many as five men have ridden on these barges when in movement. R. at 257. Mr. Orgeron oftentimes rode on the barges while they were being moved. Life vests were required during this time. R. at 352.

ARGUMENT

THE QUESTION HAS ALREADY BEEN DECIDED AUTHORITATIVELY BY CONGRESS

The dispute involved in this case has already been settled by Congress in the 1984 amendment to section 905(b) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §905(b), effective as of September 28, 1984. The amendment provides that only longshoremen may sue their employers as vessel owners under this section and that ship repair and building employees may no longer do so. This case involves a ship repair worker and could not arise again after 1984. Therefore, there is no reason for this Court to issue its writ to decide an issue already decided by Congress. This would not be a proper use of the writ of certiorari. The point is: there is no longer a significant legal problem to be resolved.

It is of the very nature of a work platform case such as this that it involves a structure used in ship repair and building cases — not other types of cases. This is the very reason why Congress in 1984 eliminated dual capacity suits against employers in repair and building cases but not in longshore cases. Congress did not want ship owners

to load and unload their own ships and thus avoid section 905(b) obligations by this convenient device. This is likely to happen in a longshoring context, but not in other contexts. It is not a likely practice, for instance, that shipowners will go into the ship repair or ship building business just to avoid such obligations. This would not be a feasible business undertaking in the same way it might be to hire a gang of men to load or unload a ship.

Petitioner argues that the question of the correct definition of a vessel in section 905(b) cases, even after 1984, will affect a large, mysterious group of workers in harbor worker occupations other than those in the ship repair and building industries. Petition at 5-8, note 1; 15-16. The only group under the 1984 amendment which may expressly bring section 905(b) dual capacity suits today are longshoremen. The great classes of harbor workers, as illustrated in the LHWCA itself, 33 U.S.C. §902(3), are longshoremen, ship repairers and ship builders and breakers. Respondent submits that the number of cases involving harbor workers not falling into these categories who might be injured by the negligence of a work platform owned by their employer under general admiralty jurisdiction will be, at best, minuscule. Surely these workers are not commonly reflected in the case law. Congress has clearly addressed the question of dual capacity suits in the 1984 amendment to section 905(b) and has, by the very fact that it has expressly addressed the major classes of harbor workers only, indicated its belief that any other workers are simply not numerous enough to justify direct mention. This should also govern considerations concerning certiorari.

Surely it would be more appropriate to wait for the unlikely event that a non-repair, non-building work platform case will arise after the 1984 amendment. This is advisable for two reasons: it is likely that this will never hap-

pen; and the case would be in a concrete non-repair context and thus much more appropriate than the present case for Supreme Court action. It is beyond question, and even petitioner must admit this, that today, *i.e.*, after 1984, this case, dealing as it does with a ship repair worker suing his employer as vessel owner, could not arise again. There simply is no important issue of federal law to decide that has not already been authoritatively decided by Congress.

THE DECISION OF THE LOUISIANA SUPREME COURT IS NOT IN CONFLICT WITH DECISIONS OF UNITED STATES COURTS OF APPEALS OR THIS COURT

Petitioner states that two of the considerations mentioned in the Supreme Court Rules, Rules 10.1 (b & c) (incorrectly identified by petitioner as 17.1(b) & (c)), favor the granting of certiorari in this case. The first consideration is a conflict between state and federal courts on the proper vessel definition under section 905(b) and the general maritime law. The second consideration is a conflict between the state court and this Court on an important issue of federal law, the vessel status test issue. Petition at 10-13.

The decision of the Louisiana Supreme Court in this case does not apply a test for vessel status contrary to that established under federal general maritime law. Rather the Louisiana Supreme Court decided that the federal general maritime law test under section 905(b) is that found in 1 U.S.C. §3. This conclusion was reached after a thorough analysis of the relevant *federal* jurisprudence on point. Therefore, there is no conflict between the state and federal courts to justify the writ of certiorari in this case. Supreme Court Rule 10.1(b). Thus, petitioner's statement that the federal courts have applied a general maritime law test, whereas the Louisiana Supreme Court applied a statutory

test different from the general maritime law test of vessel status, is not true. What the Louisiana Supreme Court did do was to hold, in full accordance with the federal jurisprudence, that 1 U.S.C. §3 *is the general maritime law test.* This was common knowledge at the admiralty bar before petitioner suggested the contrary. The petitioner says that '[t]he Louisiana Supreme Court viewed its task not as deciding whether the pontoons are vessels under the general maritime law, but as whether the pontoons are vessels under section 5(b) of the LHWCA." Petition at 9. Obviously the court viewed its task as interpreting section 905(b): this case involves a section 905(b) claim. but the state court fully understood that the test under section 905(b) is that which prevails under the general maritime law. Contrary to what petitioner asserts Petition at 13-14, the Louisiana Supreme Court opinion clearly shows that the negligence action under section 905(b) arises under general maritime law and must satisfy the jurisdictional (*Executive Jet)*[1] and vessel (1 U.S.C. §3) requirements of that law. 556 So.2d at 586-587. This was clearly pointed out by the United States Court of Appeals for the Fifth Circuit in its 1987 *en banc* decision in *Richendollar v. Diamond M. Drilling Co.,* 819 F.2d 124 (5th Cir.) (*en banc*), *cert. denied*, 484 U.S. 944, 108 S.Ct. 331 (1987). *Richendollar* also clearly applied 1 U.S.C. §3 to the question of vessel status under the general maritime law and 905(b), and not the Jones Act design and use test. 819 F.2d at 125. The Louisiana

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1. In the case of *Executive Jet Aviation v. City of Cleveland,* 409 U.S. 249, 93 S.Ct. 493 (1972), this court decided that the standard of general maritime tort jurisdiction is locality plus a relationship between the involved activity and traditional maritime activity. In addition to locality there must also be a maritime subject matter before a tort is held to be maritime in nature.

Supreme Court clearly did the same and held that 1 U.S.C. §3 supplies the definition of a vessel under the general maritime law (in other than seamen cases) and therefore under section 905(b). 556 So.2d at 587-588.

The only misunderstanding here is attributable to petitioner. The basic misunderstanding betrayed by this attempt to create a conflict between state and federal jurisprudence is illustrated by the constant citation to Jones Act cases or mixed cases (involving both the Jones Act and section 905(b)), to illustrate use of the design and use test. Petition at 9,11,13,16,18. This begs the question because the question is: does this design and use test apply in a non-Jones Act - general maritime law - 905(b) action? This question, of course, cannot be addressed by showing its application in Jones Act cases, or in mixed cases to the Jones Act question only.

Since the decision of the Louisiana Supreme Court in this case does not conflict with federal appellate precedent, the same result should have obtained had this case been filed in federal court. As previously mentioned, the federal cases which have applied the design and use test of vessel status are solely Jones Act cases, *Bernard v. Binnings Construction Co., Inc.*, 741 F.2d 824 (5th Cir. 1984), or are cases dealing with both §905(b) and the Jones Act in which the design and use test is applied to the Jones Act question only. *Ducrepont v. Baton Rouge Marine Enterprises, Inc.*, 877 F.2d 393 (5th Cir. 1989).

The United States Courts of Appeals have applied 1 U.S.C. §3 to determine vessel status in Longshore Act cases on various occasions. The capability test (1 U.S.C. §3) has been expressly and consistently applied in these cases. *Richendollar v. Diamond M. Drilling Co.; Hall v. Hvide Hull No. 3*,746 F.2d 295, 296-298 (5th Cir.), *cert. denied*, 474 U.S. 820, 106 S.Ct. 69 (1984), *McCarthy v. The Bark Pek-*

ing, 716 F.2d 130, 134, 135 (2d Cir.), *cert. denied* 465 U.S. 1078, 104 S.Ct. 1439 (1984); *Burks v. American River Transportation Company*, 679 F.2d 69, 75 (5th Cir. 1982).

These cases represent the jurisprudence of the United States Courts of Appeals for the Fifth and Second Circuits. In each case the capability test of 1 U.S.C. §3 was expressly stated to be applicable and was, in fact, applied to the issue of vessel status under the LHWCA. In *none* of these cases (other federal cases could be cited on this point) was the Jones Act design and use test applied to the vessel question under the LHWCA. In response to this consistent federal jurisprudence, petitioner can only cite to Jones Act cases (and, of course, the Jones Act test was applied to the Jones Act) and to district court cases which cannot survive the federal appellate jurisprudence referred to above.

Since there is no conflict between the Louisiana Supreme Court decision in this case and relevant federal jurisprudence, petitioner need have no fear of the spectre of forum shopping and disruption of the uniformity of maritime law which it rightly holds in such high esteem. Petition at 11-12.

Petitioner's confusion is obvious in its statement of the first question presented for review, which is stated as follows:

> **I. WHETHER, IN A GENERAL MARITIME LAW VESSEL NEGLIGENCE ACTION BROUGHT IN STATE COURT, THE LOUISIANA SUPREME COURT MAY ADOPT AND APPLY A TEST FOR VESSEL STATUS CONTRARY TO THE TEST FOR VESSEL STATUS ESTABLISHED BY FEDERAL GENERAL MARITIME LAW. p. i.**

Of course, the state court cannot adopt a test contrary to the federal test. No one has ever suggested that it could lawfully do so, least of all the Supreme Court of Louisiana. Petitioner's statement of the question is a complete *non sequitur.* A sample reading of the opinion of the Louisiana Supreme Court reveals that that court was attempting to follow federal precedent. 556 So.2d at 585-587. Even if the court had failed in this endeavor, and had failed to correctly interpret the federal precedent, which is not the case, this would still not raise the question stated by petitioner as a ground for issuance of the writ of certiorari. Petitioner is trying to bootstrap itself into a writ of certiorari by turning a disagreement with the Louisiana Supreme Court's interpretation of federal law into a refusal by that court to follow the federal law. This is not true. There is absolutely no ground here to justify the issuance of the writ.

Petitioner has attempted to create such a clash between state and federal precedent by mere assertion. For instance, petitioner says that the United States Court of Appeals for the Fifth Circuit, between the Louisiana Court of Appeal and Supreme Court decision in this case, decided the case of *Ducrepont, Supra,* which "held that a floating barge used as a work platform and adjunct to a drydock is not a vessel." Petition at 9. Petitioner would suggest that the Louisiana Supreme Court refused to follow *Ducrepont.* This is absolutely false.

A mere perusal of the Louisiana Supreme Court opinion in this case indicates that that court interpreted *Ducrepont* and followed it. 556 So.2d at 587. The petitioner's problem is that the Louisiana Supreme Court interpreted *Ducrepont* to mean something completely different then petitioner would like it to mean under the above quotation. The Federal Fifth Circuit simply did not say in

Ducrepont what petitioner says that it said. But this is a question of merit. It is not a debatable question, however, that the Louisiana Supreme Court followed (or at least attempted to do so) the *Ducrepont* case and all other relevant federal cases.

The only conflict here is between the Louisiana Supreme Court and petitioner.

Nowhere in the opinion of the United States Court of Appeals for the Fifth Circuit in the *Ducrepont* case is there any statement or inference that the tests are the same for section 905(b) and the Jones Act. Quite the contrary is the case. Not only is there no rejection of the district court's holding that the tests are not the same, but the structure of the opinion (and this is mentioned by the Louisiana Supreme Court in the present case, 556 So.2d at 587) unquestionably shows an implicit acknowledgement on the federal court's part that there are separate tests. If the tests were the same, then the *Ducrepont* court's holding that the platform was not a Jones Act vessel would have made unnecessary the discussion of section 905(b) vessel status, which is *separately* discussed and ruled upon by the court using the 1 U.S.C. §3 test. 877 F.2d at 395-396.

In its separate discussion of the section 905(b) vessel question, the *Ducrepont* court does not mention *Bernard* or any other Jones Act cases, which had been mentioned consistently throughout its previous Jones Act discussion. 877 F.2d at 395-396. There is no mention in the section 905(b) portion of the opinion of any "design and use" test. Jones Act cases were cited by the court in resolving the Jones Act issue. 877 F.2d at 395. On the *separate* section 905(b) issue only *Burks* (LHWCA case), 1 U.S.C. §3, *Davis*

v. Cargill, Inc. 808 F.2d 361 (5th Cir. 1986), (section 905(b) case) and *Richendollar* are referenced, 877 F.2d at 395-396. Thus, *Ducrepont,* in spite of what petitioner would have us believe, *again* establishes that different tests are involved.

In addition, the factual holding of *Ducrepont* certainly does not apply in this case. The work barges here involved were not "permanently moored platforms." As discussed in the Statement of the Case, *supra,* the barges here were used throughout the Avondale facility in the Harvey Canal. They were free-floating at all times and never permanently moored. They carried men and equipment during movement and were used for a variety of tasks in the Harvey Canal. They were moved constantly. Accordingly, the factual finding of *Ducrepont* to the effect that the structure was "firmly moored" and "seldom moved" is not applicable to the present case. 877 F.2d at 396.

Petitioner seems to think that there is some magical force raised by insisting that the Louisiana Supreme Court in this case adopted a "statutory"test for vessel status. Petition at 9,13,14. If petitioner means that the court applied a statute, 1 U.S.C. §3, then of course the point is correct. But petitioner seems to mean that in so doing the state court failed to apply a test suitable to the "general maritime law" phrase which petitioner would also endow with magical powers.

What petitioner has attempted to do is to argue that, since the United States Court of Appeals for the Fifth Circuit held in its *en banc* decision in *Richendollar* that section 905(b) preserved the pre-existing negligence action available under the general maritime law (by applying the general maritime law jurisdictional standard of locality - plus a traditional maritime activity (*Executive Jet* standard) to 905(b) actions), 819 F.2d at 126-127, that in some magical way this changed the pre-existing definition of a

vessel under the general maritime law (1 U.S.C. §3). Petitioner's argument is apparently a simplistic one to the effect that a "statutory" standard cannot apply to the question of vessel status under the general maritime law. Petitioner never expressly tells us why this is the case. The only explanation that is even suggested is because general maritime law is judgemade law and statutes are passed by Congress. Petition at 14. If this is petitioner's point, then it really is simplistic. Congress may certainly apply a statutory definition to questions that arise under the general maritime law. To stigmatize these as "statutory" is to state the obvious, and also to make no sensible point at all. And, of course, to point to the *en banc Richendollar* case as supportive of petitioner's argument is to add insult to injury. *Richendollar* held that a section 905(b) action arose under the general maritime law and required locality - plus a maritime connection jurisdictionally. 819 F.2d at 126, 127. In addition, *Richendollar* expressly cited, quoted, and applied 1 U.S.C. §3 to the question of vessel status under section 905(b)-general maritime law. 819 F.2d at 125 note 2.

Petitioner argues that the United States Court of Appeals for the Fifth Circuit in *Richendollar* "clearly held" that the "use of a statutory definition of a vessel in a section 5(b) case is inappropriate. 819 F.2d at 126." Petition at 14. What one finds on referring to page 126 of the reported case is that the only statutory definition of vessel rejected in *Richendollar* is that found in the LHWCA itself, 33 U.S.C. §902(21), which had been used to hold that a hull under construction on land was a vessel under the Act, a holding that is obviously imcompatible with the locality - plus maritime subject matter jurisdictional test of the general maritime law after *Executive Jet*. 819 F.2d at 126. By clearly implying that *Richendollar* was referring to 1 U.S.C. §3, petitioner is simply not telling the truth.

Petitioner is attempting to bootstrap an innocent appellate jurisprudence, *Richendollar, Ducrepont,* etc., into something revolutionary for the defense. But this is all coming from petitioner's self-serving assertions, not from these cases.

In any case, it must be kept in mind that in 1972 Congress amended the LHWCA and in doing so utilized the term "vessel" *statutorily* in section 905(b). Thus, it is quite proper to apply the definition of the United States Code to this statutory use even though the action preserved arises under the general maritime law. Section 905(b) is a statute and the term vessel does appear in it. All that is intended by stating, as *Richendollar* does, that this section preserved the action under the general maritime law, is that the general tort jurisdictional criterion, locality-plus a maritime connection, must be satisfied and other aspects of the general maritime law must be complied with; also, that no new, additional cause of action was created in 1972.

There is also no conflict between the decision of the Louisiana Supreme Court and this Court, contrary to what petitioner asserts. Supreme Court Rule 10.1(c). Petition at 12-13. The Supreme Court case that petitioner refers to as establishing the Jones Act test as the general maritime law test, *The Robert W. Parsons,* 191 U.S. 17, 24 S.Ct. 8 (1903), is not even a tort case. It is a contract case in which the question was whether the activity involved, pulling a barge (or special purpose structure) with horses, was a maritime activity sufficient to provide a maritime subject matter. *Parsons* was concerned with whether a contract having to do with that operation was a maritime contract, the breach of which would give rise to a maritime lien. In that sense, *Parsons* was relevant to the issue of locality plus nexus, *i.e.,* the maritime activity question under *Executive Jet. Richendollar* cited *Parsons* for this proposition since *Richendollar* held that *Executive Jet* applied to section

905(b). This is the relevance of *Parsons* to tort cases. Both the contract standard of jurisdiction and the tort maritime nexus standard deal with the existence of maritime subject matter, *i.e.*, maritime activity. *Parsons* was an early case dealing with a special purpose craft in a contract-lien context.

Against all the non-Jones Act federal appellate authority discussed above, petitioner would rely heavily on *Parsons* and particularly on *Richendollar's* very brief reference to the *Parsons* case. The reference is found in the *Richendollar* court's discussion under the heading of "*Jurisdiction*," that is, the discussion in the opinion attempting to determine whether there is a maritime subject matter (*Executive Jet's* nexus), *i.e.*, whether there is a vessel for purposes of the subject matter of the basic contract jurisdictional criteria. 819 F.2d at 127.

As noted earlier, the *Richendollar* court, in the opening paragraph of its opinion, expressly set forth the capability test. The only relevance of the *Parsons* citation is to illustrate that special purpose watercraft can satisfy the nexus jurisdictional requirement if they are on navigable waters (the locality jurisdictional requirement). The court, in citing *Parsons*, was simply stating the law that the fact that a special purpose vessel (a jack-up drilling rig) was involved in *Richendollar* would not disqualify the structure from vessel status. The paragraphs immediately before and after the *Parsons* reference clearly indicate that this was the case. 819 F.2d at 127.

To take the *Parsons* reference out of context and urge that it was meant as a basic restatement that the Jones Act (which is not at all involved) definition of a vessel has been substituted for the capability definition, just cited and expressly applied several paragraphs before, is a complete *non sequitur*.

The *Parsons* case is cited in Jones Act cases because the design and use test is rightly applied in such cases and the courts have used the quotation from this contract *subject-matter* case to state the design and use test. *Parsons* was quoted in *Richendollar* (a section 905(b) case) for another purpose entirely, as discussed above. *Parsons* is not cited for the design and use test in non-Jones Act-non-unseaworthiness-general maritime law-section 905(b) cases.

Also, the later United States Supreme Court case of *Norton v. Warner Co.*, 321 U.S. 565, 64 S.Ct. 747 (1944), expressly applied 1 U.S.C. Sec. 3 to the LHWCA, 321 U.S. at 571, 64 S.Ct. at 751, and would control the question of vessel definition under that statute over the earlier non-LHWCA *Parsons* case.

THE DEFINITION OF VESSEL SET FORTH IN 1 U.S.C. §3 AND NOT THE JONES ACT DEFINITION GOVERNS THE ISSUE OF VESSEL STATUS UNDER SECTION 905(B) OF THE LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT

The second question presented for review stated by petitioner, Petition at i, also misstates the substance of what is involved in the present case in the context of relevant jurisprudence. Petitioner states the question as follows:

> **II. WHETHER THE GENERAL MARITIME LAW TEST FOR VESSEL STATUS AS SET FORTH IN *THE ROBERT W. PARSONS*, 191 U.S. 17, 24 S. CT. 8 (1903) AND ITS PROGENY, OR THE STATUTORY DEFINITION OF VESSEL AS SET FORTH IN 1 U.S.C §3, GOVERNS THE ISSUE OF VESSEL STATUS IN THE GENERAL MARITIME LAW CAUSE OF ACTION FOR VESSEL NEGLIGENCE PRESERVED BY SECTION 5(B) OF THE LONGSHORE AND HARBOR WORKER' COMPENSATION ACT, 33 U.S.C. §905 (B).**

The point has to be made that the general maritime law test for vessel status (excluding seaman cases) is 1 U.S.C. §3. It is not a matter of the general maritime law test versus the test set forth in the United States Code. The real question involved in this case, contrary to the statement of question II set forth above, is whether the Jones Act - seaman test or 1 U.S.C. §3 (the general maritime law test) is the proper test under section 905(b) - general maritime law. The mere statement of the question, of course, suggests the correct answer.

Petitioner raises the question of whether the test of vessel status is the same for §905(b) and Jones Act actions, but fails to cite one single appellate case which, upon examination, expressly holds that the tests are the same - design and use. Respondent, on the other hand, does cite cases from the United States Courts of Appeals which *expressly hold* that the tests are not the same and that the section 905(b) test is that found in 1 U.S.C. §3. *Hall; McCarthy.*

On page 16 and 17 of the petition for writ of certiorari, petitioner cites eight cases as purportedly establishing that the same test applies under §905(b) and the Jones Act. Strangely enough, petitioner fails to cite *Hall* and *McCarthy* in which the United States Courts of Appeals for the Fifth and Second Circuits expressly held just the opposite. But of the cases which petitioner does cite, two may be dismissed because they are Jones Act cases (this is what petitioner means by saying "seaman's case" in parentheses following the citations) and for reasons given hereafter are not relevant (a 905(b) worker is *defined* as a non-seaman). *Bernard; Cook v. Belden Concrete Products, Inc.*, 472 F.2d 999 (5th Cir.), *cert. denied*, 414 U.S. 868, 94 S.Ct. 175 (1973). Of the two section 905(b) appellate cases that are cited, *Richendollar*, contrary to what is suggested, expressly applied 1 U.S.C. §3 to the sec-

tion 905(b) vessel status question. 819 F.2d at 125: and the other section 905(b) case, *Davis v. Cargill, Inc.*, 808 F.2d 361 (5th Cir. 1986), was a permanent attachment to land case which found the platform not "capable" of transportation because of the attachment. 808 F.2d at 362. *Atkins v. Greenvile Shipbuilding Corp.*, 411 F.2d 279 (5th Cir.), *cert. denied*, 396 U.S. 846, 90 S.Ct. 105 (1969), was also a permanent attachment - not capable case and pre-dated the existence of section 905(b). 411 F.2d at 283. The remaining three cases, all federal district court decisions, cannot survive the appellate federal jurisprudence applying 1 U.S.C. §3 to section 905(b).

The Louisiana Court of Appeal decision in this case is the only appellate decision in the United States that is known to respondent that has expressly stated that the same test applies in section 905(b) and Jones Act cases.

In sum, two federal circuits, the Fifth Circuit, *Hall*, and the Second Circuit, *McCarthy*, both dealing specially with the definition and test of vessel status under section 905(b), have *specifically* and *expressly held* that different tests must be applied to the questions of vessel status in Jones Act cases, on the one hand, and in section 905(b) cases, on the other. *Hall* at 746 F.2d at 295, footnote 10; *McCarthy* at 716 F.2d at 134, footnote 2. Both cases were cited by the Louisiana Supreme Court in this case.

Various cases from the United States Courts of Appeals have expressly applied 1 U.S.C. §3 to the vessel question under the LHWCA. *Richendollar; Hall; Burks; McCarthy.*

All cases which suggest a different test are either Jones Act cases, *Bernard*, or cases which are both Jones Act and 905(b) cases in which the different test was applied separately and solely to the Jones Act question. *Ducrepont.*

It should be observed that none of these cases, *Hall, Burks, McCarthy, Richendollar,* etc., discuss any requirement that the waterborne structure be "in navigation." And none of these cases refer to any "design and use" test.

Several section 905(b) cases have failed to find a structure to be a vessel because the capability test of 1 U.S.C. §3 was not satisfied due to the permanent attachment of the structure to the land. *Davis.* These cases *do not* stand for the proposition that 1 U.S.C. §3 does not apply to section 905(b) cases; rather, each case applied 1 U.S.C. §3 and found that, *because of the permanent attachment of the structure to the land,* it did not satisfy the "capability" test of 1 U.S.C. §3. *Davis.*

The Jones Act requires that the worker be a seaman, a crew member of a vessel in navigation. *Offshore Co. v. Robison,* 266 F.2d 769, 779 (5th Cir. 1959). In Jones Act and unseaworthiness (which also requires that a seaman be a crew member of a vessel in navigation) cases the workers are only "seaman" if the vessel is in navigation. Thus, "in navigation" is an absolute requirement for seaman status under the Jones Act. *Reynolds v. Ingalls Shipyards,* 788 F.2d 264 (5th Cir.), *cert. denied,* 479 U.S. 885, 107 S.Ct. 278 (1986). It is not a requirement for section 905(b), nor for any portion of the general maritime law other than cases of unseaworthiness. It is certainly *not* a requirement in this case where plaintiff is not a seaman but a ship repairer covered by the LHWCA. *Hollister v. Luke Construction Co.,* 517 F.2d 920 (5th Cir. 1975); *Williams v. Avondale Shipyards, Inc.,* 452 F.2d 955 (5th Cir. 1971); *Reynolds.*

The *Bernard* case and the other Jones Act cases relied upon by petitioner and the Louisiana Court of Appeal are totally irrelevant on the vessel question in this section 905(b) case. How could they be relevant? *Bernard* found that the structure was not "in navigation," 741 F.2d

at 831-834, and, thus, would not satisfy the Jones Act vessel requirement. Obviously, when it is required that the structure be in navigation, then the question of whether it was "designed or used" for navigation is highly relevant. On the other hand, when it is *not* required that the structure be in navigation, as in the present case, then it is wholly unwarranted to apply a "design and use *for navigation*" test.

It should be obvious that if a vessel has to be 'in navigation" for Jones Act and unseaworthiness claims, then the basic definition of the vessel is going to be *something more* than is required for a vessel under either section 905(b) or the locality and nexus criteria for admiralty tort jurisdiction. The basic reason why vessels must be in navigation to achieve seaman status is that seamen do their work on vessels in navigation, not just on vessels merely "capable" of navigation. Seamen, as opposed to other types of maritime workers, such as section 905(b) workers, contribute in some way to the navigation or functioning of vessels — this is what they classically do; this is their basic occupation. Thus vessels on which seamen, as opposed to other maritime workers, work fall quite logically under a "design and use" standard. It is not, however, logical to require that a repair worker, like Mr. Orgeron in this case, establish that the vessel be in navigation before he may bring a section 905(b) third party action. Clearly such a repair worker would often work on vessels not in navigation. *West v. United States,* 361 U.S. 118, 80 S.Ct. 189 (1959).

Longshoremen and harbor workers perform their functions aboard vessels both in and out of navigation. The two classes of workmen are so different that persons covered by the Jones Act are even determined by defining the meaning of the exclusion of "members of the crew" in the LHWCA. 33 U.S.C. §902(3)(g); *Pizzitolo v. Electro-Coal*

Transfer Corp., 812 F.2d 977, 982-983 (5th Cir.), *cert. denied*, 484 U.S. 1059, 108 S.Ct. 1013 (1988). A section 905(b) worker and a Jones Act seaman are polar opposite types of workmen.

The vessel status test under the Jones Act and section 905(b) are different because, under the former, we must ask whether the workman is a crew member, that is, does he work aboard a vessel (or vessels) in navigation in some more or less permanent fashion. *Robison*, 266 F.2d at 779; *Barrett v. Chevron, U.S.A., Inc.*, 781 F.2d 1067, 1072-1073 (5th Cir. 1986) *en banc*. This is precisely the opposite question from the one we ask under the LHWCA. Under the latter we ask whether the worker is *not* a crew member. If an employee is covered by the LHWCA, such as petitioner in this case, he is automatically excluded from claiming benefits under the Jones Acts and the unseaworthiness doctrine, and vice versa. *Pizzitolo*.

Different standards govern the Jones Act (and unseaworthiness) and the LHWCA. This was noted by the Louisiana Supreme Court in this case. 556 So.2d at 585. The standard of negligence and contributing negligence is different under the two statutes. *Brooks v. Great Lakes Dredge-Dock Co.*, 754 F.2d 539 (5th Cir. 1985). Only slight duties of conduct apply under the Jones Act. *Savoie v. Otto Candies, Inc.*, 692 F.2d 363, 371-372 (5th Cir. 1982). Reasonable care is the standard under the LHWCA, *De Los Santos v. Scindia Steam Navigation, Co.*, 451 U.S. 156, 101 S.Ct. 1614 (1981), and the general maritime law (other than the strict liability of the unseaworthiness doctrine). Different standards of causation also apply. As mentioned elsewhere, it would be startling if the same definition of vessel applied, since the Jones Act (and unseaworthiness) and section 905(b) are so completely different in every other way and stand at opposite poles of the legal landscape.

Thus, when the federal appellate courts have questioned vessel status for purposes of the Jones Act they have applied a "design and use" test; when they have raised the question for purposes of the section 905(b) - general maritime law action, they have applied the 1 U.S.C. §3 test. There is no conflict. The United States Courts of Appeals are quite clear on the point, as discussed above. In case after case from these appellate federal tribunals, when the design and use test is applied, the courts will preface the applications with words such as "for Jones Act purposes," "under the Jones Act," etc., clearly indicating that the application is limited to this type of case. *Bernard*, 741 F.2d at 825; *Colomb v. Texaco, Inc.*, 736 F.2d 218, 221 (5th Cir. 1984); *Waguespack v. Aetna Life & Casualty Company*, 795 F.2d 523, 526 (5th Cir. 1986).

In some of the Jones Act cases the courts will indicate that the particular structure involved is "not a vessel for purposes of the Jones Act or general maritime law." *Cook*. The cases indicate that the reference here to "general maritime law" is a reference to the unseaworthiness doctrine only and not the general maritime tort action of the general maritime law that is involved in the section 905(b) negligence action. In fact, since the 1972 amendments to the LHWCA, longshoremen and harbor workers no longer can assert an unseaworthiness action against the vessel. Only seaman, covered by the Jones Act, can now, after 1972, urge the unseaworthiness action against the vessel owner. Longshoremen's and Harbor Workers' Compensation Act amendments of 1972. Pub. L. No. 95-576, 86 Stat. 125 LK-65 (amending 33 U.S.C. §901-950).

Petitioner would elevate these references to the general maritime law in non-section 905(b) actions to a position coterminous with all actions under general maritime law. But this cannot be because these references to the general maritime law are found in cases where the plain-

tiff's action is founded on the *Jones Act and unseaworthiness only* and not on general maritime tort or section 905(b). And these cases can have no relevance to cases such as the present because today section 905(b) workers *cannot* recover under either the Jones Act or that portion of the general maritime law termed unseaworthiness. Today, post 1972, section 905(b) cases and unseaworthiness (and Jones Act) cases are totally different. As mentioned above, a single workman could not fall into both categories. The categories are mutually exclusive. *Pizzitolo.*

In summary, it would be startling if the same test applied in Jones Act and section 905(b) general maritime law cases. The reasons for determining if a structure is a vessel in the two cases are completely different. The question is asked in Jones Act cases in order to determine if a worker is a crew member of a vessel in navigation. The worker in section 905(b) cases cannot be a crew member. If he were he would not be a harbor worker and thus not covered by section 905(b). Rather, he is a longshoreman or other harbor worker who does not - *by definition* - serve aboard vessels in navigation as a crew member. *Pizzitolo.* Also, the "vessel" in Jones Act cases must be "in navigation" because crew members only perform their crew duties aboard vessels in navigation. *Wixom v. Boland Marine & Mfg. Co., Inc.,* 614 F.2d 956, 957 (5th Cir. 1980).

It must be pointed out that the Louisiana Supreme Court, as well as finding that 1 U.S.C. §3 is the appropriate vessel status test under 905(b) and the general maritime law, also found that the vessels in question were also used for transportation and navigation, a *factual finding* amply supported by the evidence and record. 556 So.2d at 588. In other words, the Louisiana Supreme Court held *as a factual matter* that, if plaintiff did have to satisfy a design and use test in this case, he had done so. 556 So.2d at 588.

The vessels in the present case were obviously intended to move men and equipment from place to place on water ("designed" for this purpose) and they were used for this purpose. The test, even under the Jones Act, is not whether the vessel was intended to engage in maritime commercial transportation. If this were the test, then most of the craft routinely found to be Jones Act vessels under the design and use test could not qualify as such.[2] Rather, the test is whether the craft was intended to move over water from place to place in the regular course of its work use. *Brunet v. Boh Bros,* 715 F.2d 196, 198-199 (5th Cir. 1983). The vessels involved in the present case certainly, *according to the factual finding of the Louisiana Supreme Court,* satisfied this requirement. 556 So.2d at 588.

Petitioner asserts that the courts have even grafted upon the 1 U.S.C. §3 definition the requirement that the structure must be actually used in navigation and not only be capable of such use. Petition at 15. This is absolutely preposterous and a total misstatement of the case cited to support it. If this assertion were true, there would be no difference between the 1 U.S.C. §3 test and the Jones Act test and this entire controversy would be non-existent. If this assertion were true, then most of the structures found to be vessels under the federal jurisprudence would not qualify as such. The case cited to support this amazing assertion, *Evansville & Bowling Green Packet Co. v. Chero Cola Bottling Co.,* 271 US 19, 46 S. Ct. 379 (1926), simply does not

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2. This is why it is so startling to find petitioner stating that federal courts of appeals decisions on the vessel status issue have required "a floating structure. . .designed and used *primarily for navigation.*" Petition at 10 (Emphasis added). This would exclude most Jones Act vessels from vessel status. This is not even a correct statement of the Jones Act design and use test. Under petitioner's test "special purpose craft" could not qualify. For instance, movable drilling barges, long held to be vessels in navigation, *Robison,* would not qualify under such a test. Although this result might be to petitioner's liking, it certainly would not conform to federal jurisprudence on the question.

so hold and petitioner's statement that it does is untrue. In *Evansville* this court held that a wharfboat permanently attached to the shore and not intended to be moved about in the regular course of its employment was *not reasonably capable* in a 1 U.S.C. §3 sense. It was that this fixation (with plumbing, telephone and electricity permanently affixed from the land) rendered the structure "incapable" of use in transportation. The case did not hold that the structure was not a vessel because it was not actually used for navigation.

Petitioner also cites the case of *Keys Jet Ski, Inc., v. Kays*, 893 F.2d 1225 (11th Cir. 1990), for the proposition that interpreting 1 U.S.C. §3 literally would lead to absurd results — according to the United States Court of Appeals for the Eleventh Circuit. Petition at 15. The Eleventh Circuit absolutely did not say this, did not "note" this and did not hold this. This is absolutely untrue. In *Keys Jet Ski* the court applied 1 U.S.C. §3 to hold that a jet ski *was a vessel* for purposes of the Limitation of Liability Act, 46 U.S.C. §181-188, because it satisfied the capability test. Petitioner's statement is a gross misstatement as to a case *which held exactly the opposite* of what petitioner says about it.

Finally, respondent would like to take this opportunity to dissent from petitioner's scurrilous attack on both the competence and integrity of the Louisiana Supreme Court. Petitioner devotes about a page and a half of its petition to an allegation that the Louisiana Supreme Court cited the wrong case at one point and then corrected the mistake upon the printing of the opinion in the Reporter. Petition at 17-18. There is no indication by the petitioner as to how this transposition of cases affected the decision in any way. The point being made by petitioner has nothing to do with the reasoning or outcome of the case. Apparently, according to petitioner, if a court intends to cite a case for an ab-

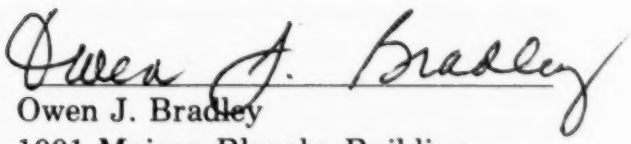
solutely correct proposition, but inadvertently refers to another case and later corrects the oversight, then this is a ground to issue a writ of certiorari. It is not grounds for issuance of a writ of certiorari that a court misnames a case, especially when this alleged error has absolutely nothing to do with the result reached in the case. Should this be characterized as a "sloppy attempt to cover up an even sloppier error that goes to the heart of the Court's decision"? Petition at 18.

CONCLUSION

For these reasons, respondent respectfully prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing were served on all counsel of record by placing same in the U.S. Mail, postage prepaid and properly addressed, this 5th day of July 1990.

Drew J. Bradley